



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

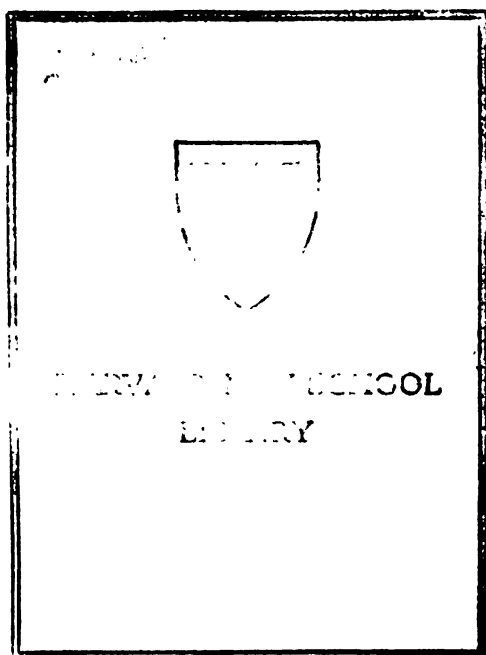
We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>















July 7

8

# REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF THE

STATE OF KANSAS.

---

A. M. F. RANDOLPH,  
REPORTER.

---

VOL. XLVII.

CONTAINING CASES DECIDED AT THE JULY TERM, 1891, AND JANUARY  
TERM, 1892.

---

TOPEKA, KANSAS.

THE HAMILTON PRINTING COMPANY: EDWIN H. SNOW, STATE PRINTER.  
1892.

ENTERED according to act of Congress, in the year 1892, by

A. M. F. RANDOLPH, REPORTER,

*For the benefit of the State of Kansas,*

In the office of the Librarian of Congress, at Washington.

*Rec. June 14, 1892*

---

## JUDGES OF THE SUPREME COURT,

DURING THE PERIOD COVERED BY THIS VOLUME.

---

HON. ALBERT H. HORTON, CHIEF JUSTICE..... Atchison.  
HON. DANIEL M. VALENTINE, ASSOCIATE JUSTICE.... Topeka.  
HON. WILLIAM A. JOHNSTON, ASSOCIATE JUSTICE.... Minneapolis.

---

### COMMISSIONERS OF THE SUPREME COURT:

HON. B. F. SIMPSON..... Topeka.  
HON. GEO. S. GREEN..... Manhattan.  
HON. J. C. STRANG..... Larned.

---

### OFFICERS:

CLERK..... C. J. BROWN..... Blue Rapids.  
REPORTER..... A. M. F. RANDOLPH..... Burlington.  
LIBRARIAN..... H. J. DENNIS..... Topeka.

---

THE TERMS of the Supreme Court are held at Topeka, on the first Tuesday of January and the first Tuesday of July, in each year; but there will be a meeting of the Court for hearing cases in every month except August—each session beginning on the first Tuesday of the month. At each such session, all cases will be assigned for hearing in which service was completed prior to the first day of the preceding month.

## JUDGES OF THE DISTRICT COURTS,

DURING THE PERIOD COVERED BY THIS VOLUME.

FIRST DISTRICT.....	HON. ROBERT CROZIER.....	Leavenworth.
SECOND.....	HON. ROBERT M. EATON.....	Atchison.
THIRD.....	HON. JOHN GUTHRIE.....	Topeka.
FOURTH.....	HON. A. W. BENSON.....	Ottawa.
FIFTH.....	HON. CHARLES B. GRAVES.....	Emporia.
SIXTH.....	HON. S. H. ALLEN <sup>1</sup> .....	Pleasanton.
SEVENTH.....	HON. L. STILLWELL.....	Erie.
EIGHTH.....	HON. M. B. NICHOLSON <sup>2</sup> .....	Council Grove.
NINTH.....	HON. L. HOUK <sup>3</sup> .....	Hutchinson.
TENTH.....	HON. JOHN T. BURRIS.....	Olathe.
ELEVENTH.....	HON. J. D. McCUE.....	Independence.
TWELFTH.....	HON. F. W. STURGES.....	Concordia.
THIRTEENTH.....	HON. M. G. TROUP.....	Winfield.
FOURTEENTH.....	HON. W. G. EASTLAND.....	Russell.
FIFTEENTH.....	HON. CYRUS HEREN.....	Osborne.
SIXTEENTH.....	HON. SAMUEL W. VANDIVERT.....	Kinsley.
SEVENTEENTH.....	HON. G. WEBB BERTRAM.....	Oberlin.
EIGHTEENTH.....	HON. C. REED.....	Wichita.
NINETEENTH.....	HON. JAMES A. RAY.....	Wellington.
TWENTIETH.....	HON. J. H. BAILEY.....	Lyons.
TWENTY-FIRST.....	HON. ROBERT B. SPILMAN.....	Manhattan.
TWENTY-SECOND.....	HON. J. F. THOMPSON.....	Sabetha.
TWENTY-THIRD.....	HON. S. J. OSBORN.....	Wa Keeney.
TWENTY-FOURTH.....	HON. G. W. MCKAY.....	Attica.
TWENTY-FIFTH.....	HON. FRANK DOSTER <sup>4</sup> .....	Marion.
TWENTY-SIXTH.....	HON. C. A. LELAND <sup>5</sup> .....	El Dorado.
TWENTY-SEVENTH.....	HON. A. J. ABBOTT.....	Garden City.
TWENTY-EIGHTH.....	HON. S. W. LESLIE <sup>6</sup> .....	Kingman.
TWENTY-NINTH.....	HON. HENRY L. ALDEN.....	Kansas City.
THIRTIETH.....	HON. B. F. THOMPSON.....	Minneapolis.
THIRTY-FIRST.....	HON. FRANCIS C. PRICE.....	Ashland.
THIRTY-SECOND.....	HON. THEO. BOTKIN.....	Springfield.
THIRTY-THIRD.....	HON. V. H. GRINSTED.....	Dighton.
THIRTY-FOURTH.....	HON. CHARLES W. SMITH.....	Stockton.
THIRTY-FIFTH.....	HON. WILLIAM THOMSON.....	Osage City.

## JUDGE OF THE COURT OF COMMON PLEAS OF SEDGWICK COUNTY,

HON. JACOB M. BALDERSTON<sup>7</sup>.....Wichita.

## JUDGE OF THE CIRCUIT COURT OF SHAWNEE COUNTY,

HON. J. B. JOHNSON.....Topeka.

## JUDGE OF THE COURT OF COMMON PLEAS OF WYANDOTTE COUNTY,

HON. THOMAS P. ANDERSON.....Kansas City.

<sup>1</sup> Succeeded by Hon. J. S. WEST, of Fort Scott, who was elected November 3, 1891.<sup>2</sup> Succeeded by Hon. JAMES HUMPHREY, of Junction City, who was elected November 3, 1891.<sup>3</sup> Succeeded by Hon. F. L. MARTIN, of Hutchinson, who was elected November 3, 1891.<sup>4</sup> Succeeded by Hon. LUCIEN EARLE, of McPherson, who was elected November 3, 1891.<sup>5</sup> Succeeded by Hon. C. W. SHINN, of El Dorado, who was elected November 3, 1891.<sup>6</sup> Succeeded by Hon. W. O. BASHORE, of Kingman, who was elected November 3, 1891.<sup>7</sup> Court ceased to exist December 31, 1891. (Laws of 1889, ch. 117, § 22.)



## OFFICERS OF U. S. COURTS FOR DISTRICT OF KANSAS,

DURING THE PERIOD COVERED BY THIS VOLUME.

---

JUDGE OF CIRCUIT COURT,	
HON. HENRY C. CALDWELL.....	LITTLE ROCK, ARK.
JUDGE OF DISTRICT COURT,	
HON. C. G. FOSTER.....	TOPEKA.
DISTRICT ATTORNEY,	
HON. J. W. ADY .....	NEWTON.
U. S. MARSHAL,	
HON. R. L. WALKER .....	TOPEKA.
CLERK OF CIRCUIT COURT,	
GEO. F. SHARITT.....	LEAVENWORTH.
CLERK OF DISTRICT COURT,	
JOSEPH C. WILSON.....	TOPEKA.

---

THE CIRCUIT COURT is held at Leavenworth on the first Monday in June, and at Topeka on the fourth Monday in November, in each year.

THE DISTRICT COURT is held at Topeka on the second Monday in April, and at Leavenworth on the second Monday in October, in each year; also at Wichita on the first Monday in September, in each year, for the hearing of cases arising in the Indian Territory.

## KANSAS STATE OFFICERS,

FOR THE YEAR 1892.

---

GOVERNOR .....	LYMAN U. HUMPHREY...	INDEPENDENCE.
LIEUT. GOVERNOR.....	ANDREW J. FELT.....	SENECA.
SECRETARY OF STATE...	WILLIAM HIGGINS.....	TOPEKA.
ASSISTANT SECRETARY...	THEO. F. ORNER.....	TOPEKA.
AUDITOR .....	CHAS. M. HOVEY.....	COLBY.
ASSISTANT AUDITOR ....	S. S. McFADDEN.....	TOPEKA.
TREASURER .....	S. G. STOVER.....	BELLEVILLE.
ASSISTANT TREASURER..	R. R. MOORE.....	TOPEKA.
ATTORNEY GENERAL...	JOHN N. IVES.....	STERLING.
SUPT. PUB. INST.....	GEORGE W. WINANS.....	JUNCTION CITY.
SUPT. INSURANCE.....	W. H. McBRIDE.....	OSBORNE.
STATE PRINTER.....	EDWIN H. SNOW .....	OTTAWA.

## TABLE OF CASES

REPORTED IN THIS VOLUME.

A.		City of Atchison, A. T. & S. F.	
Acker v. Warden.....	51	Rld. Co. v.....	712
Agarter, Clare v.....	604	City of Topeka v. Heitman...	739
Aiken v. Nogle.....	96	C. K. & N. Rly. Co. v. Broquet,	571
Allen v. Gardner.....	387	C. K. & N. Rly. Co., Dryden v.,	445
Anderson, Guthrie v.....	883	C. K. & N. Rly. Co. v. Hotz....	627
Anderson, Riggs v.....	66	C. K. & N. Rly. Co. v. Marshall,	614
Annis, Jones v.....	478	C. K. & N. Rly. Co. v. Stewart..	704
A. T. & S. F. Rld. Co. v. City of		C. K. & W. Rld. Co. v. Comm'rs	
Atchison.....	712	of Anderson Co.....	766
A. T. & S. F. Rld. Co. v. Col-		C. K. & W. Rld. Co. v. Wood-	
lins.....	11	ward.....	191
A. T. & S. F. Rld. Co. v. Comm'rs		Clare v. Agarter.....	604
of Atchison Co.....	722	Coal Co. v. Barber.....	29
A. T. & S. F. Rld. Co., Lind-		Coal Co. v. Limb.....	469
ley v.....	432	Coal Co. v. Wilson.....	460
A. T. & S. F. Rld. Co. v. Plaskett,		Coffey v. Carter.....	22
	107,	Cogshall v. Spurry.....	448
	112	Collins, A. T. & S. F. Rld. Co. v.,	11
A. T. & S. F. Rld. Co. v. Schroeder,		Combs, The State v.....	136
	315	Comm'rs of Atchison Co., A. T.	
A. T. & S. F. Rld. Co. v. Temple,		& S. F. Rld. Co. v.....	722
	7	Comm'rs of Atchison Co., Good-	
Austin v. Jones.....	565	rich v.....	355
B.		Comm'rs of Cheyenne Co.,	
Bachelder, Marshall v.....	442	Kerndt v.....	6
Banks v. Sands.....	596	Comm'rs of Hamilton Co. v.	
Barber, Coal Co. v.....	29	Webb.....	104
Barb Wire Co. v. Randolph...	420	Comm'rs of Harper Co. v. The	
Barlow v. Barlow.....	676	State, <i>ex rel.</i> ....	288
Bell, Kimball v.....	757	Comm'rs of Miami Co. v. Col-	
Bell v. Long.....	647	lins.....	417
Beverly v. Fairchild.....	289	Comm'rs of Reno Co., Lawson	
Biglow, Hillyer v.....	473	v.....	271
Booge v. Huntoon.....	250	Comm'rs of Seward Co. v. Stou-	
Booge v. Scott.....	247	fer.....	287
Boot and Shoe Co. v. Ware....	488	Condon v. Kemper.....	126
Bradford v. Loan Co.....	587	Cook v. Larson.....	70
Bradley, Russell v.....	438	Cook, M. K. & T. Rly. Co. v.....	216
Branham, Moody v.....	314	Coverdale, Work v.....	307
Broquet, C. K. & N. Rly. Co. v.,	571	Cox v. Grubb.....	435
Brown v. Barber.....	527	Cross v. Hollister.....	652
Brown, Gagnon v.....	83	Cross, <i>Petitioner, In re.</i> ....	250
Brown v. Irwin.....	50	Culp v. Steere.....	746
Brown, Sullivan v.....	708	Curtis v. Paggett.....	86
Burton, The State, <i>ex rel.</i> , v....	44		
Bush, <i>Petitioner, In re.</i> ....	264		
Bush, The State v.....	201		
C.		D.	
Cackley v. Parry.....	647	Doak, Guy v.....	236, 366
Cackley v. Smith.....	642	Drug Co. v. Malm.....	762
Carr v. Huffman.....	188	Dryden v. C. K. & N. Rly. Co.,	445
Center, Myers v.....	324	Duncan, Steele v.....	511
		Durham v. Hadley.....	78

## TABLE OF CASES.

vii

<b>E.</b>		<i>In re Harmer, Petitioner</i> .....	262
Eberline, The State v.....	155	<i>In re Hyde, Petitioner</i> .....	277
Estlinbaum, The State v.....	291	<i>In re Lowe, Appellant</i> .....	769
<b>F.</b>		<i>In re McKenna, Petitioner</i> ....	738
Fair Association v. Thummel..	182	<i>In re Nickell, Petitioner</i> .....	784
Fairehild, Beverly v.....	289	<i>In re Noonan, Petitioner</i> .....	771
Ft. S. W. & W. Rly. Co. v. Tubbs,	630	<i>In re Pinkney, Petitioner</i> .....	89
Fulton v. Land Co.....	621	<i>In re Rabbitt, Petitioner</i> .....	382
<b>G.</b>		<i>In re Short, Petitioner</i> .....	250
Gagnon v. Brown.....	83	<i>In re Swartz, Petitioner</i> .....	157
Gano, Mo. Pac. Rly. Co. v.....	457	<i>In re Williams, Petitioner</i> ....	383
Gardner, Allen v.....	337	Insurance Co. v. Johnson.....	1
Gemeny, White v.....	741	Insurance Co. v. Laggart.....	663
Gibbs, W. & C. Rly. Co. v.....	274	Insurance Co., Manlove v.....	309
Glover, Paint Co. v.....	15	Insurance Co., Naill v.....	223
Goff, School District v.....	101	Insurance Co. v. Wood.....	521
Goodacre v. Skinner.....	575	Irwin, Brown v.....	50
Goodrich v. Comm'rs of Atchison Co.....	355	<b>J.</b>	
Goranch, S. K. Rly. Co. v.....	583	Jackson v. Linnington.....	396
Griffin v. O'Neil.....	116	Jenkins, Pray v.....	599
Griswold v. Huffaker.....	690	Jockheck, The State v.....	733
Grouch v. Martin.....	313	Johnson Insurance Co. v.....	1
Grubb, Cox v.....	435	Johnson, Tyler v.....	410
Guthrie v. Anderson.....	383	Johnson, W. & W. Rld. Co. v...	351
Guy v. Doak.....	236, 366	Jones v. Annis.....	478
<b>H.</b>		Jones, Austin v.....	565
Hadley, Durham v.....	73	<b>K.</b>	
Hardware Co. v. Implement Co..	423	K. C. Rld. Co., The State, <i>ex</i>	
Harmer, <i>Petitioner, In re</i> .....	262	rel., v.....	497
Hedeen, The State v.....	402	Kemper, Condon v.....	126
Heitman, City of Topeka v....	739	Kerndt v. Comm'rs of Cheyenne	
Heizer v. Pawsey.....	83	Co.....	6
Hill v. Wand.....	340	Kerr, Tracy v.....	656
Hillyer v. Biglow.....	473	Kimball v. Bell.....	757
Hoffman v. Hill.....	611	Kimball, Shippen v.....	173
Hollister, Cross v.....	652	Kirk, The State, <i>ex rel.</i> , v.....	151
Hopkins v. Hopkins.....	103	Koch, W. & W. Rly. Co. v.....	753
Hopkins, Linn Co. Bank v.....	580	Kurtz, Schuster v.....	255
Horneman v. Harlan.....	413	<b>L.</b>	
Hotz, C. K. & N. Rly. Co. v.....	627	Laggart, Insurance Co. v.....	663
Howbert v. Heyle.....	58	Laing, Teney v.....	297
Huffaker, Griswold v.....	690	Land Co., Fulton v.....	621
Huffman, Carr v.....	188	Large, Swartz v.....	304
Humes, Mullaney v.....	99	Larson, Cook v.....	70
Humphrey, The State, <i>ex rel.</i> , v..	561	Lawson v. Comm'rs of Reno	
Huntton, Booge v.....	250	Co.....	271
Hurd v. Simpson.....	245, 372	Lea, Mo. Pac. Rly. Co. v.....	263
Hyde, <i>Petitioner, In re</i> .....	277	Levagood, Mastin v.....	36, 764
<b>I.</b>		Limb, Coal Co. v.....	469
Implement Co., Hardware Co. v.	423	Lindley v. A. T. & S. F. Rld. Co..	432
Innes, Woodman v.....	26	Linn Co. Bank v. Hopkins....	580
<i>In re Bush, Petitioner</i> .....	264	Linnington, Jackson v.....	396
<i>In re Cross, Petitioner</i> .....	250	Loan Co., Bradford v.....	537
		Long, Bell v.....	647
		Lowe, <i>Appellant, In re</i> .....	769
		Lumber Co., Springs Co. v....	672

M.		Richardson, St. L. & S. F. Rly.	
Machine Co. v. Morse .....	429	Co. v. ....	517
Malm, Drug Co. v. ....	762	Riggs v. Anderson..	66
Manlove v. Insurance Co .....	309	Riggs, The State v. ....	507
Marshall v. Bachelder .....	442	Rose v. Newman .....	18
Marshall, C. K. & N. Rly. Co. v..	614	Russell v. Bradley .....	438
Martindale, The State, <i>ex rel.</i> , v..	147	S.	
Martin, Grouch v .....	313	Sands, Banks v. ....	596
Mastin v. Levagood .....	36, 764	Sands, National Bank v .....	596
McKenna, <i>Petitioner, In re</i> ....	738	Sands, Watkins National Bank	
McLafferty, The State v. ....	140	v. ....	591
McLaughlin, The State v. ....	143	School District v. Goff .....	101
McNulty v. McNulty .....	208	Schoonmaker, Osborne v. ....	667
M. K. & T. Rly. Co. v. Cook .....	216	Schroeder, A. T. & S. F. Rld.	
Moody v. Branham .....	314	Co. v. ....	315
Moore v. The State, <i>ex rel.</i> ....	772	Schuster v. Kurtz .....	255
Mo. Pac. Rly. Co. v. Gano .....	457	Scott, Booge v. ....	247
Mo. Pac. Rly. Co. v. Lea .....	268	Shellabarger v. Mottin .....	451
Mo. Pac. Rly. Co. v. Young-		Shippen v. Kimball .....	173
strom .....	349	Short, <i>Petitioner, In re</i> .....	250
Mottin, Shellabarger v .....	451	Simpson, Hurd v. ....	245, 372
Mottin, State Bank v .....	455	Skinner, Goodacre v. ....	575
Mullaney v. Humes .....	99	S. K. Rly. Co. v. Gorsuch .....	583
Myers v. Center .....	324	Smith, Cackley v. ....	642
N.		Spendlove, The State c. ....	160
Naill v. Insurance Co. ....	223	Springs Co. v. Lumber Co. ....	672
National Bank, Pollard v .....	406	Spurry, Cogshall v. ....	448
National Bank v. Sands .....	596	Standiford, O'Bryan v. ....	24
Newman, Rose v. ....	18	State Bank v. Mottin .....	455
Nickell, <i>Petitioner, In re</i> .....	734	Steele v. Duncan .....	511
Nipp, Winfield Bank v. ....	744	Steere, Culp v. ....	746
Nogle, Aiken v. ....	96	Stewart, C. K. & N. Rly. Co. v..	704
Noonan, <i>Petitioner, In re</i> .....	771	St. L. & S. F. Rly. Co. v. Rich-	
Nulty, The State v. ....	259	ardson .....	517
Nunnally, Olson v. ....	391	St. L. & S. F. Rly. Co. v.	
O.		Suaveley .....	637
O'Bryan v. Standiford .....	24	Stoufer, Comm'rs of Seward	
Olson v. Nunnally .....	391	Co. v. ....	287
O'Neil, Griffin v. ....	116	Stover, The State, <i>ex rel.</i> , v. ....	119
Osborne v. Schoonmaker .....	667	Sullivan v. Brown .....	708
P.		Swartz v. Large .....	304
Paggett, Curtis v. ....	86	Swartz, <i>Petitioner, In re</i> .....	157
Paint Co. v. Glover .....	15	T.	
Parry, Cackley v .....	647	Taylor, Pickens v .....	294
Pawsey, Heizer v. ....	83	Temple, A. T. & S. F. Rld. Co.	
Phipps v. Phipps .....	328	v. ....	7
Pickens v. Taylor .....	294	Teney v. Laing .....	297
Pinkney, <i>Petitioner, In re</i> ....	89	The State v. Bush .....	201
Plaskett, A. T. & S. F. Rld. Co.		The State v. Combs .....	136
v. ....	107, 112	The State v. Eberline .....	155
Pollard v. National Bank .....	406	The State v. Estlinbaum .....	291
Pray v. Jenkins .....	599	The State v. Hedeen .....	402
R.		The State v. Jockheck .....	733
Rabbitt, <i>Petitioner, In re</i> .....	382	The State v. McLafferty .....	140
Randolph, Barb Wire Co. v. ....	420	The State v. McLaughlin .....	143
		The State v. Nulty .....	259
		The State v. Riggs .....	507

# TABLE OF CASES.

ix

The State v. Spendlove.....	160	Warner, Tipton v.....	606
The State v. Tuchman.....	726	Waters v. Trovillo.....	197
The State v. Woodruff.....	151	Watkins National Bank v.	
The State v. Zimmerman.....	242	Sands.....	591
The State, <i>ex rel.</i> , v. Burton... 44		Webb, Comm'rs of Hamilton	
The State, <i>ex rel.</i> , Comm'rs of		Co. v.....	104
Harper Co. v.....	288	White v. Gemeny.....	741
The State, <i>ex rel.</i> , v. Humphrey, 561		Williams, <i>Petitioner, In re.</i> ....	383
The State, <i>ex rel.</i> , v. K. C. Rld.		Wilson, Coal Co. v.....	460
Co.....	497	Winfield Bank v. Nipp.....	744
The State, <i>ex rel.</i> , v. Kirk.....	151	Wood, Insurance Co. v.....	521
The State, <i>ex rel.</i> , v. Martin-		Woodman v. Innes.....	26
dale.....	147	Woodruff, The State v.....	151
The State, <i>ex rel.</i> , Moore v....	772	Woodward, C. K. & W. Rld. Co.	
The State, <i>ex rel.</i> , v. Stover... 119		v.....	191
Thummel, Fair Association v.. 182		Wood v. Wood.....	617
Tipton v. Warner.....	606	Work v. Coverdale.....	307
Tracy v. Kerr.....	656	W. & C. Rly. Co. v. Gibbs.....	274
Trovillo, Waters v.....	197	W. & W. Rly. Co. v. Johnson..	351
Tubbs, Ft. S. W. & W. Rly. Co.		W. & W. Rly. Co. v. Koch.....	753
v.....	630		
Tyler v. Johnson.....	410	Y.	
		Youngstrom, Mo. Pac. Rly. Co.	
W.		v.....	349
Wand, Hill v.....	340		
Warden, Acker v.....	51	Z.	
Ware, Boot and Shoe Co. v....	483	Zimmerman, The State v.....	242

THIS volume contains 167 cases, in which opinions were written by the Justices as follows: HORTON, C. J., 26; VALENTINE, J., 25; JOHNSTON, J., 25; and by the Commissioners as follows: SIMPSON, C., 25; GREEN, C., 26; STRANG, C., 26. In 14 cases *per curiam* opinions only were filed. Chief Justice HORTON filed separate opinions in four cases, concurring in two, (pp. 718, 725,) and dissenting in two, (pp. 96, 195.) Mr. Justice VALENTINE filed separate opinions in six cases, concurring in one, (p. 559,) concurring specially in two, (pp. 172, 205,) and dissenting in three, (pp. 230, 715, 726.) Mr. Justice JOHNSTON filed one separate dissenting opinion, (p. 179.)

All cases decided prior to March 1, 1892, and not before reported, (except 16 in which opinions were filed in February, 1892,) are contained in this volume.

---

#### ERRATA.

Page 122: Line 18 from bottom, for "39" read 93.

Page 221: Line 11 from bottom, insert "it" before *is*.

Page 373: Line 19 from top, for "45 *id.*" read 46 *id.*

Page 402: Line 5 of proposition 2 of syllabus, for "are" read *is*.

Page 414: Line 15 from bottom, after "and" insert *being*.

Page 455: Line 1 of proposition 1 of syllabus, for "mortgagor" read *mortgagee*.

Page 559: Subhead at top should be *Concurring Opinion*.

Page 563: Line 11 from bottom, for "22" read 220.

Page 623: Line 12 from top, for "the" read *their*.

## IN MEMORIAM.

---

BE IT REMEMBERED, That on Friday, the 5th day of February, 1892, before the Supreme Court of the State of Kansas, at the supreme court room, in the city of Topeka, the following proceedings were had, and remain of record in said court:

And now comes John W. Day, Esq., and presents to the court the following:

*"May it please the Court:* At the late meeting of the Kansas State Bar Association, Hon. Samuel A. Kingman, ex-chief justice of this court, Hon. J. W. Sutherland, and John W. Day, were commissioned on behalf of said association to present to the court an appropriate memorial in commemoration of the Honorable Lawrence D. Bailey, one of the first associate justices of this court, who, on the 15th day of August, 1891, departed this life, at the historic city of Lawrence, Kas., at the advanced age of 71 years, 11 months, and 19 days. On behalf of the committee, I have been delegated to present to the court the memorial they have prepared, and move the court to direct the clerk to enter the same upon the journal of the proceedings of the court.

"It is with some embarrassment that I come to the performance of the duty assigned to me, because it would seem more in harmony with the occasion that the chairman of the committee, the venerable Samuel A. Kingman, who was long associated with the deceased upon the bench, present this memorial to the court. It is, too, with sadness, not unmixed with pleasure, that I bring to you this memorial of our deceased friend and brother—sadness because of the departure from our sight and our association of one whom some of us have known so long, so well, and so favorably; yet our sorrow is mingled with pleasurable recollections of his many virtues, his sterling manhood, and his faithfulness in the discharge of all the duties of an honorable and patriotic citizen, alike in private life and public position.

"Lawrence D. Bailey was born at Sutton, in Merrimac county, New Hampshire, August 26, 1819. He was admitted to the bar in his native state in 1846, and removed to Kansas territory in the spring of 1857. He took up his residence in the new territory at a time when two antagonistic parties were contending for supremacy—one endeavoring to permanently engraft the curse of human slavery on and into the institutions of the new state soon to be erected, and the other as



earnestly determined to rededicate to freedom and free institutions the virgin soil of this central territory, from which it had been wrested by congressional legislation. With the fire of New England liberty burning in his breast, and with the firmness and steadfastness of the rock-ribbed hills among which he had spent the years of his youth and early manhood, he threw the weight of his influence on the side of liberty and free institutions in Kansas, and at once became a prominent factor in promoting the cause of the free-state party.

"The memorial here presented gives a brief outline of the valuable public services of Judge Bailey to the state, and I need not more particularly refer to them. I leave it to others more intimately associated with him to speak of his life, his disposition, his temper, his eccentricities, his public services, his inherent honesty of purpose, and the tenacity with which he held fast to his settled convictions of right, justice, and equity.

"I move the court that an order be made that this memorial of our departed brother be spread at length upon the journal of the proceedings of the court."

#### MEMORIAL.

*"May it please the Court:* At the late meeting of the Kansas State Bar Association, Samuel A. Kingman, J. W. Sutherland, and John W. Day were commissioned to present to the Supreme Court of Kansas a brief memorial in commemoration of the late Lawrence D. Bailey, who was one of the first associate justices of this court. Said committee respectfully submit the following report:

"Lawrence D. Bailey was born at Sutton, Merrimac county, New Hampshire, August 26, 1819. He received an academic education, and was admitted to the bar in 1846. He removed to the territory of Kansas in April, 1857, and settled upon a "claim" in Douglas county. The same year he removed to Emporia, and there opened the first law office in that part of the present state.

"At the election of state officers, held December 6, 1859, under the Wyandotte constitution, the judges of the supreme court chosen were Thomas Ewing, jr., chief justice, to serve for six years; Samuel A. Kingman, associate justice, for four years; and Lawrence D. Bailey, associate justice, for two years. Judge Bailey was subsequently elected to the same position for a full term of six years, and held the office for eight years, from 1861 to 1869, when he was succeeded in January, 1869, by Daniel M. Valentine.

"Subsequent to his retirement from the bench, Judge Bailey devoted much of his time to agricultural pursuits. He served as a member of the legislature a number of years. He was the founder of the *Kansas Farmer*, an agricultural paper that is still published in the city of Topeka. He was for four years president of the Kansas State Agricultural Society and the State Board of Agriculture. His latter years were spent in the western part of the state, his home being at Garden City, in Finney county. He died at Lawrence, Kas., on the 15th day of August, 1891, at the advanced age of 71 years.

"Those who knew him well have pleasurable recollections of his many virtues, his sterling manhood and manliness, his uniform courtesy, his faithful discharge of his public and official duties, of his honorable life, and as a patriotic citizen of the commonwealth. He had the universal respect of the people, and in his death the state has lost an honorable and honored citizen, for he was an honest man, and an upright and just judge.

SAMUEL A. KINGMAN.  
J. W. SUTHERLAND.  
JOHN W. DAY."

Mr. Justice D. M. Valentine remarked as follows concerning the above memorial:

"I concur in all that has been said commendatory of Judge Bailey. Our acquaintance commenced more than 30 years ago, and developed into a mutual friendship which continued unbroken up to the day of his death. Judge Bailey was an honest, honorable and conscientious man, and was also a man of strong convictions, of strong likes and dislikes, and was sometimes seemingly impulsive, but at all times and in all cases he was a true friend. His literary attainments were excellent. He enjoyed poetry most, though he seldom attempted to write any. But from his love and devotion to poetry, he procured a much more extended knowledge of poetry and the poets than is usually possessed by educated men, or is usually found among members of our profession, whether on the bench or at the bar. As to prose, he had command of and wrote the most excellent English. For all his good qualities of head and heart, he deserves to be remembered by the bench and bar of this state."

And, thereupon, it is ordered by the court that the said motion be allowed; that the said memorial, together with the remarks concerning the same, be spread upon the journal. It is further ordered that, as a mark of respect for the memory of ex-Justice Lawrence D. Bailey, this court do now adjourn for the day.



# SUPREME COURT, STATE OF KANSAS.

JULY TERM, 1891.

PRESENT:

HON. ALBERT H. HORTON, CHIEF JUSTICE.  
HON. DANIEL M. VALENTINE, } ASSOCIATE JUSTICES.  
HON. WILLIAM A. JOHNSTON, }

THE DWELLING-HOUSE INSURANCE COMPANY V. I. C.  
JOHNSON *et al.*

1. **INSURANCE**—*Action on Policy—Evidence and Instructions, not Within Issues.* In an action to recover on a policy of insurance, the plaintiff alleged the contract of insurance, the loss by fire and the refusal of payment. The insurance company answered that a material condition of the contract had been broken, and that the rights of the assured under the policy had been forfeited. The plaintiff replied by a general denial. On the trial, proof was offered over objection tending to show that the company had waived the condition and was estopped from taking advantage of the forfeiture, and also that since the loss a final compromise and settlement had been agreed upon between the assured and an agent of the company. *Held*, That this evidence and the instructions based thereon were not within the issues and should have been excluded.
2. **ESTOPPEL**—*Acts to be Pledged.* All acts, representations and conduct relied on as an estoppel should be specially pleaded before evidence to establish the same can be received.

*Error from Shawnee District Court.*

**ACTION** to recover on a fire insurance policy. Judgment for plaintiffs, *Johnson & Williams*, at the April term, 1888.

1.—47 KAS.

47	1
48	244
48	247
48	398
47	1
51	729
53	111
47	1
60	717
47	1
82	325

The defendant *Company* brings the case here. The opinion states the facts.

*Rossington, Smith & Dallas*, and *P. L. Soper*, for plaintiff in error.

*David Overmyer*, for defendants in error.

The opinion of the court was delivered by

JOHNSTON, J.: This was an action brought by Johnson & Williams upon a fire insurance policy issued by the Dwelling-House Insurance Company. In their petition they set forth the contract of insurance, the payment of the premium, the destruction by fire of some of the property insured, on December 26, 1886; that the loss sustained was \$1,600, and that the company had refused to pay the loss, although the plaintiffs had performed all the conditions of the policy incumbent upon them. The defendant answered, admitting the execution of the policy, but alleging a breach of the condition of the same in regard to incumbrances. The company averred that in the written application for insurance, upon the faith of which the policy was issued, Johnson & Williams represented and declared that they were the absolute owners of the property sought to be insured, and that their property was unincumbered, when in fact there was upon the property at the time of the execution of the policy a mortgage lien and incumbrance; and it alleged that there was a provision of the policy to the effect that if the interest of the insured in the property was, at the time of the execution of the policy, or should become, any other or less than a perfect legal and equitable title, free from all liens whatever, except as stated in writing upon the policy, then the policy should be absolutely void. It was further alleged that the insured, without the knowledge or consent of the company, and in violation of the provisions of the policy, executed and delivered another mortgage upon the property, after the execution of the policy, and before the loss occurred. The reply of Johnson & Williams was a denial of the foregoing facts alleged in the answer.

---

Opinion of the Court.

---

The trial resulted in a verdict and judgment against the company, and it complains of the ruling of the court in admitting testimony and in instructing the jury.

On the trial the plaintiffs below were permitted to offer proof tending to establish a waiver of the condition of the policy respecting incumbrances, and such as would estop the company from urging the forfeiture against a recovery on the policy. It is undisputed that at the time the contract of insurance was made there was a mortgage of \$3,500 upon the property insured, and it had not been discharged when the loss occurred. Testimony was given, over objection, that the agent wrote the answers in the application respecting incumbrances after it had been signed by the assured, and also tending to show that the agent knew of the existence of the mortgage when the contract of insurance was made. The court instructed the jury that—

“As the local agent might by contract indorsed on the policy have waived the answer to the questions with respect to incumbrances, or might have waived the condition concerning the mortgage, so he may, by acts and conduct of dealing with the assured, do that which amounts to such waiver.”

Testimony was also introduced concerning a settlement made by one Peck, an adjuster of the company, shortly after the fire occurred, by which it was agreed between the insured and the adjuster that, if a reduction of \$112 was made from the amount claimed, the loss would be paid at once. In respect to this defense the court charged the jury:

“If you find from the evidence that, after the loss by fire of the insured property, on or about January 22, 1887, Peck, the adjuster of the company defendant, went on the plaintiffs' premises and assisted the plaintiffs to make the proof of loss, and that said adjusting agent had full knowledge of the mortgage on the premises of the plaintiffs, if there was a mortgage, and that said adjusting agent of defendant, with full knowledge of all the facts, agreed with the plaintiffs, as a final settlement of the loss, to pay plaintiffs the sum of \$1,488, as such settlement, and that the plaintiffs agreed with the adjusting agent of defendant to accept \$1,488 in full satisfaction

of the loss under this policy, then the parties should stand by this settlement, and your verdict should be for the plaintiffs for \$1,488, with interest at 7 per cent. from the time this sum was made payable by the agreement of the parties, if you find there was such agreement entered into."

It is said that the amount named in the verdict of the jury corresponds with the amount mentioned by the court in its instruction. It is insisted that this evidence and these instructions are not within the issues or warranted by the pleadings in the case, and we are forced to that conclusion. The conduct and acts of the agent and the adjuster relied on as a waiver form an important condition of the contract, and, to estop the company from claiming a forfeiture, should have been specially pleaded, and the same may be said respecting the compromise and settlement which has been referred to. This was new matter, which should have been set forth in the reply with frankness and certainty, so that the company could have been prepared to meet the issues with its proof. As the issues were framed, the company had no notice that the assured would make any claim of waiver or estoppel. They set up in their petition the contract, the loss, and the refusal of payment. The company answered that certain conditions of the contract had been broken, and hence no recovery could be had. The assured replied by a mere denial, which was nothing more than to say that no breach had occurred. It gave no intimation that the assured admitted the existence of an incumbrance, but insisted that the company was estopped to take advantage of a forfeiture. The condition alleged to have been broken was an important one. In respect to it, the court charged the jury that a breach of the same would render the policy void and defeat a recovery, unless the company was estopped by its own acts or had waived the warranty given by the assured. If the acts of waiver and estoppel had been pleaded, there was sufficient testimony produced by plaintiffs below to warrant the instructions given by the court. Undoubtedly an agent clothed with the authority or apparent authority of the agent in this case may waive the conditions



## Opinion of the Court.

and stipulations in the policy, and might also by his knowledge and acts estop the company from availing itself of a breach of condition or a forfeiture in certain cases. The evidence given to the jury on this subject, however, did not controvert the truth of the defense pleaded by the company, but practically admitted it, and then assigned reasons why the company should not be permitted to avail itself of such a defense. It is uniformly held that a waiver or estoppel must be specially pleaded before evidence to establish the same can be admitted. Under

2. Estoppel —  
acts to be  
pleaded.

our code, the facts relied upon as a ground of action or defense must be clearly and concisely stated and a definite issue presented, so that the opposite party may not be taken by surprise upon the trial, but may be fairly notified of what he is required to meet. The new matter introduced in this case was not put in issue by the pleadings, and the company may, as it alleges, have been taken by surprise and wholly unprepared with its proof to contest the new issue. Neither the evidence introduced nor the instructions based thereon are warranted under the pleadings as they exist, and before they can be properly received the reply must be amended. As tending

1. Insurance —  
action on policy — evidence  
and instructions, not  
within issues.

to sustain this conclusion, we cite *Insurance Co. v. McLanathan*, 11 Kas. 533; *Railroad Co. v. Grove*, 39 id. 731; *Railroad Co. v. Irwin*, 35 id. 286; *Insurance Co. v. Hutchins*, 53 Tex. 61; *Hayes v. Mut. Pro. Ass'n*, 76 Va. 225; *Lumbert v. Palmer*, 29 Iowa, 104; *Northrup v. Insurance Co.*, 47 Mo. 435; *Warder v. Baldwin*, 51 Wis. 450; *Delphi v. Startzman*, 104 Ind. 343; *Phillips v. Van Schaick*, 37 Iowa, 229; *Dale v. Turner*, 34 Mich. 405; Pom. Rem., §§556, 590, 661.

Error is assigned on the refusal of the court to permit an amendment of the answer just before entering upon the trial. The facts set forth in the proposed amendment constituted a defense, but the record fails to show any sufficient reason for the delay in presenting this defense, and, as the matter of amendment at that stage of the proceeding is largely within the discretion of the court, we cannot hold the ruling to be a reversible

---

Kerndt v. Comm'rs of Cheyenne Co.

---

error. As there must be a new trial of the case, an opportunity will be given to both parties to amend their pleadings, and the objections suggested can thus be overcome.

We find nothing more in the record that requires attention, but the errors mentioned compel a reversal of the judgment and the granting of a new trial.

All the Justices concurring.

---

CHARLES J. KERNDT V. THE BOARD OF COMMISSIONERS  
OF CHEYENNE COUNTY.

**DEFECTIVE RECORD—Case, Dismissed.** Where the record on appeal shows that the findings and judgment are entitled in another case, without any explanation other than by counsel for plaintiff in error in their brief, to the effect that the same were adopted by the trial court from the other case, without changing the title, the petition in error will be dismissed.

*Error from Cheyenne District Court.*

THE opinion states the case.

*S. W. McElroy, and S. B. Bradford, for plaintiff in error.*

Opinion by SIMPSON, C.: The record of this case is in a peculiar condition. Most of the proceedings are entitled in one case, while the findings and judgment are entitled in another case, with different parties plaintiff and defendant. This purports to be the record of the case of "Charles J. Kerndt v. Castle, Swartz and McCullough, County Commissioners of Cheyenne county." The findings and judgment are entitled in the case of "Thomas J. McCarty and R. W. Joqua, *ex rel.*, v. Edwin N. Phillips, Clerk District Court." Counsel for plaintiff in error in their brief say that this is caused by the trial court adopting for its findings and judgment those of another case, without changing the title of the other case.

The record itself does not contain any hint or reference to such adoption, and we are bound by that, rather than the statement of counsel outside the record. No briefs are filed by counsel for the defendants in error, or no stipulations filed explaining the record.

We recommend that the petition in error be dismissed.

By the Court: It is so ordered.

All the Justices concurring.

47	7
47	14
47	756

47	7
73	468

# THE ATCHISON, TOPEKA & SANTA FÉ RAILROAD COMPANY V. SAMUEL A. TEMPLE.

**CARRIER—Injuries to Stock—Notice of Claim.** A contract between a railroad company and a shipper of stock stipulated that, as a condition precedent to his right to recover damages for any loss or injury to such stock, he should give notice in writing to some officer of the railroad company, or its nearest station agent, before the removal of such stock from the place of delivery. In an action to recover damages for injuries to such stock while *en route*, where the condition of the stock was made known to the station agent of the railroad company at the place of destination, and such agent consented to the removal of the stock from the car, and had an opportunity to examine and inspect the animals after such removal and before they had mingled with other stock or been removed from the place of destination, and a written notice for damages was transmitted to the claim agent of the railroad company within four days after the removal of the stock from the car; and 10 days thereafter, upon the death of one of the animals, a subsequent notice for damages was given to the railroad company: *Held*, That there had been a substantial compliance with the contract, upon the part of the shipper.

## *Error from Finney District Court.*

THE facts appear in the opinion. Judgment for the plaintiff, *Temple*, at the August term, 1888. The defendant *Railroad Company* brings the case to this court.

*Geo. R. Peck, A. A. Hurd, and J. G. Egan, for plaintiff in error.*

*Brown, Bierer & Cotteral, for defendant in error.*

Opinion by GREEN, C.: This was an action for damages, commenced in the district court of Finney county, by Samuel A. Temple against the Atchison, Topeka & Santa Fé Railroad Company. The plaintiff alleged that on the 21st day of March, 1887, he shipped over the defendant's railroad, from Kansas City to Pierceville, Kas., a bay mare and three mules; that a written contract for the transportation of the stock was made, a copy of which was attached to his petition; that the railroad company broke the contract by negligently and violently striking the car in which the stock was being transported against another car, and thus throwing the animals together upon the floor of the car and injuring them, resulting in the death of the mare and the crippling of the mules; that the condition of the stock was made known to the agent of the railroad company at Pierceville while they were in the car at the station; that the agent inspected the stock, and consented and requested that the mare and mules be removed from the car, and, after such removal and before they had been intermingled with other stock, inspected the injured animals; and that, before bringing suit and after the death of the mare, written notice was given to the defendant, through its agent, of the plaintiff's claim for damages. The contract of shipping contained the following condition:

"And for the consideration before mentioned, said party of the second part further agrees that, as a condition precedent to his right to recover any damages for loss or injury to said stock, he will give notice in writing of his claim therefor to some officer of said party of the first part, or its nearest station agent, before said stock is removed from place of destination above mentioned, or from the place of delivery of the same to said party of the second part, and before said stock is mingled with other stock."

The defendant filed a general denial, and for a further de-

---

Opinion of the Court.

---

fense alleged that the plaintiff had not complied with the condition precedent in the contract for transportation, requiring written notice of the claim for damages. The defendant filed a demurrer to the plaintiff's evidence, which was overruled. No evidence was introduced upon the part of the defendant. The jury returned a verdict for the plaintiff for the sum of \$345. A motion for a new trial was overruled, and judgment was rendered on the verdict.

The plaintiff in error brings the record here for review, and the principal assignment of error is, that there was not such a substantial compliance with the condition precedent, as to a written notice of a claim for damages under the contract, as to entitle the plaintiff to recover. Complaint is made that the court refused certain instructions asked for by the defendant in error, to the effect that if the plaintiff did not give a written notice of his claim for damages to some officer of the railroad company, or its nearest station agent, before the stock was removed from the place of destination or place of delivery, and before they were mingled with other stock, that then their verdict should be for the defendant. Further, that if they should find from the evidence that the plaintiff did not serve upon the defendant a written demand for damages for injury or loss of the mare in question until April 7, 1887, after the death of the mare and her removal from the place of destination or delivery, or after the animals had mingled with other stock, then their verdict should be for the defendant. We think the instructions requested were properly refused. Upon this branch of the case the court instructed the jury as follows:

"You are instructed that the railroad company has a right to limit their responsibilities to the owners in the carrying of stock or goods by a special contract, so long as the limitation does not affect their liability on account of negligence or misconduct. Plaintiff further alleges that the animals were removed from the car in which the injury was sustained by the advice and with the knowledge and the consent of the employes of the defendant prior to the time that written notice was given of any claim of damage because of said injuries. Should

you find from the testimony that the animals were so removed, and that the mare died from the injuries so received, and that the mules were injured so as to be depreciated in value, and that the death of the mare and the injuries to the mules were caused by the carelessness and negligence of the agents and servants of the defendant company, and that the company had a good, fair and reasonable opportunity to examine and inspect all of such stock, and to know of its condition after it was removed without unreasonable inconvenience, you will then find that the service of the notice of application for damages was made in due time, and that the company is not absolved from liability because of the fact that the written notice introduced in the testimony was not served upon the station agent or other employé of the company named in said contract prior to the removal of the stock from the car at the place of destination. The purpose of such notice is that the company may have a fair and reasonable opportunity of examination and inspection of the condition of the live stock transported under its management before it shall be placed beyond its reach or beyond the possibility of certain identification."

The court stated the law correctly. The plaintiff in error seems to rely upon the cases of *Goggin v. K. P. Rly. Co.*, 12 Kas. 416, and *Sprague v. Mo. Pac. Rly. Co.*, 34 id. 352. In the former case, no written notice was given for more than a year after the cattle were injured; and in the latter case, no notice was given before suit was commenced. In the case before us, written notice was given within a few days after the stock arrived at Pierceville, and before the mules were taken from the place of destination. While the carrier may stipulate by contract that notice of a claim for damages shall be given within a specified time in order to be valid, still the construction upon such stipulations must be reasonable, and adapted to the circumstances of each case. (3 Am. & Eng. Encyc. of Law, 15.) This court said, in the case of *Goggin v. K. P. Rly. Co.*, supra:

"Of course, it is not understood that by the phrase 'before or at the time the stock is unloaded,' that it must be the identical moment, but so immediately that the object sought by the notice can be attained. Nor would such notice be reasonable in the case of an ordinary shipper who did not accompany

and superintend his stock, nor would it probably prevent a recovery for injuries sustained which could not readily be seen, and actually should not be discovered till the time of giving notice had expired." (*Rice v. K. P. Rly. Co.*, 63 Mo. 314; *Oxley v. St. Louis &c. Rld. Co.*, 65 id. 629.)

It is claimed that the court erred in permitting a witness for the plaintiff to testify to a conversation had with some employé of the railroad company at Argentine, where it seems the stock was injured. In this conversation the employé told him how the accident had occurred; that there had been a jam and the stock had been injured. The evidence may not have been competent, but we fail to see how the railroad company was prejudiced. It was established that the car and stock were in good condition at Kansas City. When next seen at Argentine, the mare and mules were injured and the car damaged. There was no controversy about there having been an accident, and the statement of the employé of the railroad company was immaterial error. We need not notice the other errors, as they are of the same nature.

It is recommended that the judgment of the district court be affirmed.

By the Court: It is so ordered.

All the Justices concurring.

---

THE ATCHISON, TOPEKA & SANTA FÉ RAILROAD COMPANY V. WILLIAM F. COLLINS.

1. **HEARSAY TESTIMONY**—*No Material Error*. Where hearsay testimony is introduced in the trial of an action, but it appears that the adverse party's rights were not thereby prejudiced, *held*, that no material error was committed.
2. **CASE, Followed**. The case of *A. T. & S. F. Rld. Co. v. Temple*, just decided, followed.
3. **INCOMPETENT EVIDENCE**—*Harmless Error*. The admission of incompetent evidence, which is not prejudicial, is not sufficient ground to set aside a judgment and grant a new trial.



*Error from Finney District Court.*

JUDGMENT for plaintiff, *Collins*, at the August term, 1888. The defendant *Railroad Company* brings the case to this court. The facts sufficiently appear in the opinion.

*Geo. R. Peck, A. A. Hurd, and J. G. Egan*, for plaintiff in error.

*Brown, Bierer & Cotteral*, for defendant in error.

Opinion by GREEN, C.: This was an action brought in the district court of Finney county, by William F. Collins against the Atchison, Topeka & Santa Fé Railroad Company, to recover damages for the loss of a mare, shipped from Winfield to Hartland over the railroad of the defendant below, under a written contract which provided:

"And for the consideration before mentioned, said party of the second part further agrees that, as a condition precedent to his right to recover any damages for loss or injury to said stock, he will give notice in writing of his claim therefor to some officer of said party of the first part, or its nearest station agent, before said stock is removed from the place of destination above mentioned, or from the place of delivery of the same to said party of the second part, and before such stock is mingled with other stock."

The defendant answered that no notice had been given by the plaintiff for damages, as required by the contract. The plaintiff, in reply, alleged that the mare had been removed from the car at Garden City, with the knowledge and request of the defendant's agents; that after the death of the mare, the plaintiff notified the station agent in writing at Garden City of his claim for damages. The jury returned a verdict in favor of the plaintiff for the sum of \$175. A motion for a new trial was overruled, and judgment was rendered for the amount of the verdict.

I. The first assignment of error is in the admission of testimony claimed to be hearsay. The plaintiff stated that he

had a conversation with one of the trainmen, about 15 minutes after the jar which it is claimed caused the injury to the mare, in which the man apologized for being so rough with the train, saying he thought that there was a brakeman on the bunch of cars which ran against the car of stock. The accident occurred at Valley Center. The car containing the plaintiff's stock was set out upon a siding, and, in switching, five or six cars were permitted to run down grade against the car occupied by the plaintiff. The plaintiff testified that the cars had no brakeman upon them. There was really no controversy about how the accident occurred. While the statement of the trainman was not a part of the *res gestæ*, its admission was immaterial error.

It is claimed that the plaintiff below was allowed to give evidence of another conversation said to have taken place with some employé of the railroad, in which the plaintiff told the employé that the mare was hurt, and the latter remarked that he had better take her off at Garden City; also, that the plaintiff gave evidence, over the objection of the defendant, to the fact that some railroad man was present when the mare was unloaded at Garden City, and knew where the horses were taken. The evidence established the fact that the mare was unloaded at Garden City, with the consent of the company, and we do not think there was any prejudicial error in this statement of the plaintiff. The company consented to the removal of the mare and accepted the freight.

II. It is urged that the written claim for damages was not served until some time after the mare had arrived at Garden City, and had been unloaded and placed in a stable in which other animals were kept. This question was raised by several instructions which were requested and refused, to the effect that, if the plaintiff did not give a written notice of his claim for damages for the loss of the mare in question to the station agent at Garden City until after the mare had been removed from the place of delivery to the livery stable, or until after she had mingled with other stock, the jury should return a verdict for the defendant. This raises substantially the

---

A. T. & S. F. Rld. Co. v. Collins.

---

same question which we have just decided, in the case of *A. T. & S. F. Rld. Co. v. Temple*, and, upon the authority of that case, we think the instructions were properly refused. The mare was unloaded on the 5th of March, and until she died was kept separate from other stock. The jury found that the written claim for damages was delivered by the plaintiff to the station agent of the railroad company at Garden City about the 10th or 12th of March, 1887. This, we think, was sufficient.

III. The last objection urged by the plaintiff in error is, that the plaintiff below was permitted to give evidence, over the objection of the defendant, that the contract was signed after the stock had been loaded, and that he received no reduced rate. It is claimed that this evidence was foreign to the issue in the case. We do not know for what purpose this evidence was introduced. The defendant in error says there was no attack on the consideration and validity of the contract. The question was one of negligence, and the court instructed the jury that the action was upon a written contract, and that the railroad company had a right to limit its responsibility to the owner for the carrying of stock by special contract, so long as the limitation did not affect the liability on account of negligence or misconduct.

The court instructed the jury as to the contract and the performance of the condition precedent, thus eliminating this testimony from the case, and we think there was no material error in its admission.

We recommend an affirmance of the judgment.

By the Court: It is so ordered.

All the Justices concurring.

THE F. HAMMAR PAINT COMPANY V. GEORGE C.  
GLOVER.

1. **WARRANTY—Breach—Damages.** In an action for damages for a breach of warranty concerning the quality of certain paint, probable or future damages, which are not certain, fixed, or liquidated, cannot be allowed.
2. ——— **Nominal Damages.** If there is a breach of warranty in the sale of personal property on the part of the seller, the right of nominal damages exists at once in favor of the purchaser.
3. ——— **Elements of Damages.** If a breach of warranty on the part of the seller in the sale of paint, or any similar article of use, has involved the purchaser in a legal liability to pay money, or to incur expense to other parties for whom he did work with the paint or other article, to relieve himself against the effects of the bad quality of the paint or other article, such liability or expense, if certain, fixed, or liquidated, whether paid or not, constitutes an element of damages for which the defendant is entitled to recover.

*Error from Lyon District Court.*

THE opinion states the nature of the action and the material facts. Judgment for the defendant, *Glover*, at the September term, 1888, for \$248 damages. The plaintiff *Company* brings the case to this court.

*J. G. Hutchison*, for plaintiff in error.

*Lambert & Dickson*, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: Several preliminary questions are presented in this case, but we need to refer to one only. It is urged that the case-made does not, in terms, purport to contain all of the evidence. We have carefully examined the alleged omissions from the record, and are of the opinion that it does not properly show that all the evidence is preserved. (*Ryan v. Madden*, 46 Kas. 245; same case, 26 Pac. Rep. 679.) There is no statement at the end of the testimony showing the case contains all that was offered. The stenographer certifies that the record contains a true and correct copy of her

---

Paint Co. v. Glover.

---

short-hand notes of the evidence, excepting the matter set forth on page 21½ of the record. A statement is also included in the certificate of the judge who settled the case, to the effect that it embraces the evidence introduced on the trial, but the certificate and the statement of the district judge are ineffectual to accomplish the purpose intended. (*Railroad Co. v. Grimes*, 38 Kas. 241; *Eddy v. Weaver*, 37 id. 540.)

We have decided, time and again, that—

“In order to have the question whether the evidence supports the findings and judgment examined, the case-made should show that it contains all the evidence. A statement to that effect in the certificate of the district judge settling the case, or in the notice served with the case upon the opposing party, when such notice is not a part of the case-made, is insufficient.” (*Newby v. Myers*, 44 Kas. 477.)

It is urged that the case contains the evidence, within the rule laid down in *Dewey v. Linscott*, 20 Kas. 686, and *Lewis v. Linscott*, 37 id. 386. We find, however, that this is not true. There are palpable omissions from the record, notably exhibit “A” referred to in the testimony of plaintiff. There are also other exhibits marked “A” “A” and “B” which ought to have been attached to the depositions read upon the trial, but these are not included with the depositions, and are placed after the judgment. It is difficult, without having been present at the trial, to ascertain to which depositions the several exhibits at the end of the case belong. As far as we can understand the case, from the partial record presented, the material facts are as follows: In 1886, Geo. C. Glover was a painter residing and carrying on his business in Emporia, in this state. In January, 1886, he purchased of the F. Hammar Paint Company 51 gallons of paint; on the 6th of September, 1886, he purchased 30 gallons; on the 7th of March, 1887, he purchased 51 gallons, and on the 18th of May, 1887, he also purchased 51 gallons. The paint cost him \$1 a gallon. He paid for the paint purchased in January and September, 1886, but refused to pay for the paint purchased in March and May, 1887, amounting to \$102, be-

---

Opinion of the Court.

---

cause he alleged that it was worthless. This case was tried before the court with a jury. The jury returned a verdict in favor of the defendant for \$300 as his damages, and the trial court compelled the defendant to remit \$52 of the verdict, and judgment was rendered for \$248 in favor of the defendant and against the plaintiff. The defendant testified upon the trial, among other things, that he purchased the paint upon the following warranty :

"Any buildings, when painted with prepared paints, according to directions, and applied properly, we will guarantee to give satisfaction or repaint free of charge to the owner."

"That he used the paint upon two houses belonging to Mr. Hughes, upon Mr. Bundrem's house, Mr. Balweg's house, Mr. Ford's house, Mr. McCoy's fence, and his own house; that this work was worth \$300; that it would cost \$140 to put the work in proper condition to be repainted; that the paint purchased, with the exception of the first lot, was unsatisfactory; that the paint commenced to crack and peel off in three to six months; that he told the plaintiff the work done with its paint was peeling off, and requested the company to repaint the same; and that this has not been done."

There were no exceptions taken to the instructions given, and the only instruction prayed for, which was refused, is as follows :

"If the jury believe from the evidence that the defendant, Glover, has been paid in full for all the painting he has done with the paint bought of these plaintiffs, and that he has not had to refund any of the money or repaint any of the houses, then defendant has not sustained any damage, and the jury must find for the plaintiffs in the full amount of their claim, as stated in their bill of particulars, and interest thereon."

This instruction does not correctly declare the law, and was therefore properly refused. If there was a breach of the warranty on the part of the plaintiff, the right to nominal damages existed at once in favor of the defendant to vindicate the right. If the consequences of the act for which the law renders the party in default responsible have developed themselves so as to create absolute injury before the verdict, the jury are bound to give compensation for such injury; but

---

 Rose v. Newman.
 

---

if at the time of trial the loss is still only probable, the verdict should be but nominal damages. (1 Sedg. Dam., 7th ed., p. 200.)

In all cases where the defendant personally agreed to repaint, upon request so to do, an actual liability against him exists, which can be enforced in the way of damages, if he refuses to perform. If the plaintiff's breach of the warranty has involved the defendant in a legal liability to pay money or to incur expense to the parties for whom he did work, to relieve himself against the effects of the bad paint, such liability or expense, whether paid or not, constitutes an element of damages which the defendant was entitled to recover.

It is probable that, if all the evidence introduced upon the trial had been properly preserved in the record, and sufficient exceptions had been taken to the instructions of the trial court, the large judgment rendered for damages against the plaintiff would not be allowed to stand; but upon the record as presented, and the exceptions therein appearing, we cannot interfere.

The judgment of the district court must be affirmed.

All the Justices concurring.

---

### E. D. ROSE V. SAMUEL NEWMAN.

**EJECTMENT—Rights of Person Holding Under Tax Deed.** Where the holder of a tax deed is defeated in an action for the recovery of land sold at the tax sale and described in the tax deed, and the successful claimant is adjudged to pay the holder of the tax deed the taxes, interest, costs, etc., as allowed by law, before he is let into possession, such holder of the tax deed is entitled to retain the possession of the land until the successful claimant pays the taxes, interest, costs, etc., as required of him by the judgment of the court.

*Error from Jackson District Court.*

THE opinion states the facts.

47	18
54	663
47	18
661	718
47	18
66	194

*Keller & Noble*, for plaintiff in error.

*James H. Lowell*, for defendant in error.

Opinion by STRANG, C.: Action of ejectment by E. D. Rose against Samuel Newman, to recover the possession of lot No. 20, in the city of Holton, Jackson county, Kansas. One McHugh purchased said lot at a tax sale in 1867, and afterward sold the same to the plaintiff. The plaintiff leased said lot to Naylor & Williams, who agreed to pay the taxes on the lot for the use of it. Naylor & Williams erected a barn on the lot and carried on a livery business therein. Afterward Williams sold his interest in the business and the lease to a man named Tucker, who, with Naylor, carried on the business for some time, when they both sold out to the defendant, who, with the consent of the plaintiff, took possession of the premises under the lease of the plaintiff to Naylor & Williams. Before the said lease expired, one Linscott brought an action against this plaintiff to recover the possession of the lot. In that case the court adjudged the tax deed under which Rose claimed the land void, and that Linscott was the owner of the lot in fee, and also entitled to the sum of \$400, for the use of the land, from Rose, but found that Rose was entitled to \$141.97 for taxes paid on said lot and interest thereon, and adjudged that Linscott should pay to Rose said sum of \$141.97, before he should be let into possession of the premises. Execution was issued on said judgment against Rose for the \$400 adjudged to Linscott for the use of said lot, and that sum, with interest and cost of the execution, collected. Linscott did not pay Rose the \$141.97, nor did any one else ever pay Rose said sum, or any part thereof. After Linscott recovered judgment against Rose, as above stated, he sold his interest in said land to one Wilson, and gave a bond for a deed; and, after several transfers, the defendant, Newman, while still holding possession of the lot under the lease from Rose, purchased the Linscott title to said land, obtaining quitclaims from the several parties through



whom it had passed, and also of Linscott and wife. Some time afterward, and after the expiration of the lease under which Newman was holding, Rose notified him to quit and surrender the possession of the premises to him, which Newman refused to do, and Rose brought this suit to recover the premises. At the March term, 1888, the case was tried by the court without a jury, resulting in a judgment for the defendant. The plaintiff brings the case here for review.

The question is, was this judgment right under the evidence as it appears in the record? We do not think it was. It is conceded that Rose was in possession of the lot when he leased to Naylor & Williams, and that Newman went into possession under said lease as the tenant of Rose, and he should have surrendered his possession to Rose. Newman justified his refusal to surrender the possession of the lot to Rose by asserting that, during the life-time of the lease and while he had a right to the possession under the same, the court, in the case of Linscott against Rose, had adjudged the land to Linscott in fee, and that he had purchased Linscott's title. This was true; but did that give him the right of possession of the lot? We think not. The same adjudication which decreed Linscott the owner in fee of said lot also declared that Linscott should not have possession of the same until he paid Rose the \$141.97 due him under the law for taxes paid and interest thereon. Who was entitled to the possession of the lot in the meantime, until the \$141.97 was paid to Rose? Manifestly Rose was. Newman's right to the possession under the lease had expired, and there was no one else that had any claim of right to possession under the decree in the case of Linscott against Rose except Linscott, and he could not obtain the possession of said lot until he had paid Rose his \$141.97. If Linscott could not get possession without first paying the amount adjudged to Rose, he could not, by selling his interest in the lot to Newman, give Newman any right to the possession until the money was paid to Rose, and the condition upon which the possession could be obtained from Rose was complied with.

It is asserted that Newman made a tender of payment to

---

Opinion of the Court.

---

Rose of the amount of his lien on the lot. An examination of the evidence satisfies us that no tender was ever made. The evidence of Newman himself completely refutes any claim of tender. The offer of \$150 by Newman to Rose was a mere offer to settle or compromise the matter relating to their conflicting claims to the lot. Newman testified that, at the time he talked with Rose and offered to settle and pay Rose \$150, he did not know how much the claim of Rose under the judgment of the court in the case of Linscott against Rose amounted to; that he had never figured it up. A little calculation of interest shows that the Rose claim amounted to more than \$150 at the time Newman told Rose he would give him \$150 to settle the matter. The evidence of Rose is, that Newman offered him \$150 for a quitclaim deed to the lot, and the evidence of Newman, on cross-examination, harmonizes with this view. Rose being in possession of the lot by his tenant Newman when the suit of Linscott against him was brought and decided, and the court in that case having adjudged that Linscott should not have possession of the lot until he paid Rose the amount of his claim, and said claim never having been paid, Rose remained in possession, and had the right of possession that was wrongfully withheld from him by Newman after the expiration of the lease and the service upon him by Rose of notice to quit, and had, therefore, the right of possession at the commencement of this suit. It is therefore recommended that the judgment of the district court be reversed, and the case remanded for a new trial.

By the Court: It is so ordered.

All the Justices concurring.

---

Coffey v. Carter.

---

F. M. COFFEY v. JOHN F. CARTER *et al.*

**JUDGMENT, *When not Vacated.*** A defendant in an action to foreclose liens of material-men and mechanics, who is personally served with summons, and allows judgment to go against him by default, is not entitled, nearly six months thereafter, and at a subsequent term of the court, and after the property has been sold at sheriff's sale, to have the judgments vacated on motion or petition, without showing that he has a defense to the whole or a part of the action in which the judgments are rendered.

*Error from Marion District Court.*

THE opinion states the facts.

*Winslow, McDuffie & Curtis*, for plaintiff in error.

*Keller & Dean*, for defendant in error Carter.

Opinion by STRANG, C.: John F. Carter, one of the defendants in error, began this action in the court below, April 12, 1888, to recover a judgment against F. M. Coffey for lumber and building material amounting to \$457, sold by the former to the latter, for the erection of a dwelling upon lots 33, 34, 35, and 36, block 21, Santa Fé addition to the city of Florence, Marion county, Kansas, and to foreclose a lien for material thereon. The other defendants in error were made defendants in the court below because of some interest claimed by them in the premises, and each of said defendants filed a cross-petition asking for affirmative relief in the form of a judgment and foreclosure of lien. F. M. Coffey, defendant below, made default, and the court, when the case came up for hearing, entered judgment for Carter on his petition, and foreclosed his lien on the lots described. The other defendants were given judgments on their cross-petitions, and each had his lien for material or labor foreclosed. All these judgments were entered May 28, 1888. November 19, 1888, the plaintiff in error went into the district court and filed a motion to vacate all the judgments in the case, which motion was

---

Opinion of the Court.

---

sustained as to the judgment of the Badger Lumber Company for \$54.19, and overruled as to the other judgments. Coffey brings the case here, alleging that the other judgments should have been vacated, and points out several reasons why the ruling of the district court on the motion to vacate should be reversed. Without examining the alleged errors pointed out by the plaintiff in error, we think there are several reasons why he cannot insist upon a reversal of this case. First, before the suit was begun in the court below, Coffey, the defendant therein and plaintiff in error, had sold and conveyed by a quitclaim deed all his interest in the premises described in the petition to one Richard Wilson, who had assumed the payment of the liens thereon. It follows, then, that when his motion was filed Coffey had no interest in the controversy, and, therefore, no standing in court, and could not be heard to complain about a matter in which he had no interest. Besides, he had allowed judgment to go against him by default, after personal service, and had waited nearly six months, and until the property had been sold by the sheriff on an order of sale growing out of the judgment and foreclosure of the liens thereon, before he went into court to attack the proceedings by his motion to vacate. This was inexcusable delay in asserting his rights, if he had any, in the premises. He should have defended against the judgments of foreclosure, if he had any defense, or moved their vacation soon after their rendition, and not have waited until after a sale of the premises had been had thereon. Suppose the proceedings upon which the judgments were had were irregular: it would avail nothing to set them aside, after the premises had been sold at sheriff's sale.

Again, the plaintiff in error made no showing of any defense to the actions on which the judgments were rendered, in connection with his motion to vacate said judgments. A mere allegation in the affidavit in support of his motion that he had a defense is not sufficient. The facts constituting the defense must be stated, so that the court may adjudge whether or not a defense exists. Having made no showing of any de-

---

O'Bryan v. Standiford.

---

fense to the action in which the judgments were rendered, the plaintiff in error failed to put himself in a position to entitle him to a vacation of the judgments, even if subject to such a motion as made by him, and hence it was not error for the trial court to overrule such motion. (Gen. Stat. of 1889, ¶ 4673.) "A judgment shall not be vacated on motion or petition until it is adjudged that there is a defense to the action on which the judgment is rendered." (*Anderson v. Beebe*, 22 Kas. 768.)

For the reasons given above, and without examining further the errors complained of, it is recommended that the judgment of the district court be affirmed.

By the Court: It is so ordered.

All the Justices concurring.

---

T. L. O'BRYAN *et al.* v. STANDIFORD, YOUNG & ELDRED.

NOTE—*Action—Unverified Answer—Pleading Payment.* In an action on a note and mortgage, where the petition is sworn to, an unverified answer alleging payment and satisfaction of the debt will put in issue the question of payment, and it is error for the trial court to render judgment on the pleadings in favor of the plaintiffs.

*Error from Barber District Court.*

THE case is stated in the opinion.

*W. S. Denton*, for plaintiffs in error.

*E. C. Sample*, for defendants in error.

Opinion by GREEN, C.: This was an action on a note and mortgage, commenced in the district court of Barber county.

The plaintiffs filed an ordinary petition in a foreclosure suit, which was duly verified by one of their attorneys. The defendants answered, first, by denying all of the allegations of the petition except the execution of the note and mortgage described in the petition; and, for a second defense,

---

Opinion of the Court.

---

alleged that the debt sued upon had been wholly paid and satisfied in full. The answer was not sworn to. The plaintiffs filed a motion for judgment on the pleadings, which was sustained by the court, and judgment was accordingly rendered in favor of the plaintiffs for the amount prayed for in their petition, and a decree was entered for the foreclosure and sale of the mortgaged premises. The plaintiffs in error bring the record here for review.

The court below seemed to have held that, because the petition was sworn to and the answer was unverified, the latter did not raise an issue, and therefore rendered judgment in accordance with the prayer of the petition. This was error. The defendants below, in their answer, alleged payment and satisfaction of the debt, which, if true, was a complete defense to the action. There was no necessity for a verification of the answer under § 108 of the code. That section provides that, in all actions, allegations of the execution of written instruments and indorsements thereon, of the existence of a corporation or partnership, or of an appointment or authority, or the correctness of any account, duly verified by the affidavit of the party, his agent, or attorney, shall be taken as true, unless the denial of the same be verified by the affidavit of the party, his agent, or attorney. This does not include the defense of payment.

It is claimed by the defendants in error that the answer was rightfully disregarded, because the summons was returnable on the 21st day of April, 1888, and therefore the answer should have been filed on or before the 11th day of May following. But opposed to this position is the fact that the summons designated when the defendants should answer, and the further fact that they did file their answer on the very day named in the summons. The motion for judgment on the pleadings should have been overruled.

It is recommended that the judgment of the district court be reversed, and a new trial be granted.

By the Court: It is so ordered.

All the Justices concurring.

ELIZABETH WOODMAN *et al.* v. INNES & ROSS *et al.*

**CONTRACT—Against Public Policy.** Where the general public has an interest in the location of a public office, like that of a post office in a city, a contract to induce the retention of the post office at a given point, thereby restricting its location in the city to one place only, for individual benefit or personal gain, is against public policy, and not enforceable.

*Error from Sedgwick District Court.*

THE opinion states the facts. Judgment for defendants, Ross and others, April 7, 1888. The plaintiffs, Woodman and others, bring the case to this court.

*Harris & Vermilion*, for plaintiffs in error.

*Dale & Wall*, for defendants in error.

The opinion of the court was delivered by

HORTON, C. J.: The material facts of this case are as follows: The firms of Innes & Ross and Aldrich & Brown, in 1882, owned property and were engaged in business on Main street, in the city of Wichita, in this state, near the building where the post office in Wichita was kept. They were desirous of having the post office remain in the building near their place of business, and, as an inducement to have the post office remain in the building, on the 1st of October, 1882, they executed and delivered to W. C. Woodman their written contract, whereby they agreed to pay him, as part of the rent for the post-office building, the sum of \$75 every three months. The post office was continuously kept in the building on Main street up to the 1st of October, 1886, and the firms of Innes & Ross and Aldrich & Brown paid the rent up to the 1st day of October, 1885, but refused thereafter to pay any further rent. On the 24th of December, 1886, W. C. Woodman commenced his action to recover \$303.96 for the residue of the rent, which he claimed to be due upon the written contract. While the action was pending in the court below, W. C.

---

Opinion of the Court.

---

Woodman died, and his executors were substituted, by the order of the court, as plaintiffs. Upon the trial the defendant objected to the introduction of any evidence. The court sustained the objection, holding that the contract was against public policy, and therefore void. We approve of the ruling of the trial court. It was decided in *Railroad Co. v. Ryan*, 11 Kas. 609, that a contract not to have or use a depot within three miles of a given point was against public policy, and void. It was said in that case, among other things, that—

“Railroad corporations are, as we have seen, public agencies, and perform a public duty. They are agencies created by the public, with certain privileges, and subject to certain obligations. A contract that they will not discharge, or by which they cannot discharge those obligations, is a breach of that public duty, and cannot be enforced. They are under obligations to use the utmost human sagacity and foresight in the construction of their roads, to prevent accidents to passengers. A contract that they will not use such sagacity and foresight certainly cannot be upheld. They are under obligations to employ skillful and competent engineers to manage their engines, and other competent employes to superintend and take care of the running of their trains. A contract that they will not employ such agents and servants is certainly void. They are bound to furnish reasonable facilities for the transportation of freight and passengers, both as to the quality and quantity of cars and coaches, and the number of trains, and a contract not to furnish such facilities will not be tolerated. So though one train a day with one freight car and one passenger coach might be at present amply sufficient to do all the business between two given places, yet a contract never to run but one train a day with the one car and coach, could not be upheld, for the necessities of trade and travel are varying, and it is the duty of the company to adjust its capacities and facilities for business to these varying necessities. Upon the same principle, it is the duty of a railroad company to furnish reasonable depot facilities. The number and location of the depots, so as to constitute reasonable depot facilities, vary with the changes and amount of population and business. A contract to leave a certain distance along the line of the road destitute of depots is in contravention of this duty.”

Under the allegations of the petition, the location of the



---

Woodman v. Innes.

---

post office in this case was to be restricted to one place. The government locates only one post office in a city, and such office is a public one, and the general public has an interest in the location of the office. Any contract which is made for the purpose of securing the location of such an office, or which prevents, or tends to prevent, the change or removal of such an office, when the necessities of business or the interest of the public demand a change or removal, tends to the injury of the public service, and therefore is against public policy. Such contracts as referred to in the petition tend to improperly influence those engaged in the public service, and also tend to subordinate the public welfare to individual convenience or gain. Parties should not be permitted to make contracts which induce personal or private interest to overbear public duty or public welfare. (*County Lodge v. Crary*, 98 Ind. 238.)

Counsel for plaintiffs say that the written contract of the parties is enforceable, because it is not shown that it is unfair, or that any undue influence was to be used to retain the post office on Main street. Such contracts lead to secret, improper and corrupt influences, to the injury of the public. In this view, we cannot think it good policy for the courts to enforce such contracts.

"All agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question, whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country." (*Tool Co. v. Norris*, 2 Wall. 45.)

If W. C. Woodman had no control over the location of the post office, or if he could not, by his influence, representations, or otherwise, induce the United States post-office department to permit him to retain the post office upon Main street, then the contract sued upon was wholly without consideration, and for that reason ought not to be enforced.

The case of *Beal v. Polhemus*, 67 Mich. 130, (34 N. W. Rep. 532,) which is referred to as fully sustaining the petition, is somewhat different in its facts, but all said therein is not satisfactory to us.

The judgment of the district court will be affirmed.

All the Justices concurring.

# THE LEAVENWORTH COAL COMPANY V. ALLEN BARBER *et al.*

1. FRACTIONS OF A DAY—*Judicial Notice.* Where it is necessary to justice, and it can be done, the courts may take notice of the fractions of a day; and the precise time when an act is done may be shown.
2. STATUTE—*Taking Effect.* Where a statute provides that it shall take effect "from and after its publication," in computing the time when it takes effect, the day of its publication is to be included; but the precise time of its publication, or taking effect, may be shown, where an act is done on the same day of its publication, if the hour of publication affects such act in any way.
3. APPEAL, *When not Taken—Statute.* No appeal or proceeding in error can be had or taken from and after the publication of chapter 245, Laws of 1889, made on the 20th of March, 1889, to the supreme court in any civil action, unless the amount or value in controversy, exclusive of costs, exceeds \$100, except in cases involving the tax or revenue laws, or the title to real estate, or damages for slander, libel, malicious prosecution, or false imprisonment, or the constitution of this state, or the constitution, laws or treaties of the United States, and when in such a case the judge of the district or superior court trying the case involving less than \$100 shall certify to the supreme court that the case is one belonging to the excepted classes. (Civil Code, §542a, Gen. Stat. of 1889, ¶4642.)
4. VESTED RIGHTS—*Valid Statute.* A party who has been defeated in a civil action in the district court has no vested right to an appeal or to the prosecution of proceedings in error in the supreme court to review the rulings or judgment of the district court before he has filed his appeal or proceedings in the supreme court; and an act of

47	29
50	487
47	29
53	180
47	29
56	134
47	29
66	504
47	29
68	518
68	557
47	29
69	858
47	29
75	25
47	29
76	144

the legislature taking away the privilege of appeal or the permission to prosecute proceedings in error before the appeal or petition in error is filed, is valid and constitutional.

*Error from Leavenworth District Court.*

THE opinion states the case.

*T. A. Hurd*, for plaintiff in error.

*W. W. Black*, for defendants in error.

The opinion of the court was delivered by

HORTON, C. J.: On the 2d day of February, 1889, Allen Barber and Frank Seichpine recovered a judgment against the Leavenworth Coal Company for \$65 and costs, taxed at \$72.20. The coal company excepted to the judgment, and on February 20, 1889, the case-made was duly settled and signed by Hon. Robert Crozier, judge of the district court of Leavenworth county. On the 20th of March, 1889, the coal company filed a petition in error in this court, and also a præcipe directing the issuance of a summons thereon.

A motion has been submitted by the plaintiffs below to dismiss the proceedings in error, under the provisions of chapter 245, Laws of 1889. (Civil Code, § 542a; Gen. Stat. of 1889, ¶ 4642.) Chapter 245 was approved on March 2, 1889. Section 2 provides that "This act shall take effect and be in force from and after its publication in the official state paper." The act was published in the official state paper on the 20th of March, 1889, the same day as that upon which the petition in error and præcipe were filed in this court. The question therefore arises, whether the day of the publication is included or excluded, as the act provides that it shall take effect "from and after its publication." And also, the further question arises, if the day of publication is to be included, not excluded, at what precise time on the 20th of March, 1889, did chapter 245 go into force. Undoubtedly the great weight of authority is to the effect that a statute which is to take effect "from and after its passage" takes effect upon the day of its passage. (*Arnold v. United States*, 9 Cranch, 104; *Matthews v. Zane*, 7

## Opinion of the Court.

Wheat. 164, 211; *Mallory v. Hiles*, 4 Metc. (Ky.) 53; *People v. Clark*, 1 Cal. 406.) The reason usually assigned for this is, that it is in accordance with the general rule that when a computation of time is to be made from an act done, the day on which the act is done is to be included. (*Arnold v. United States*, supra; *Mallory v. Hiles*, supra.)

In *Dougherty v. Porter*, 18 Kas. 206, Mr. Justice BREWER approvingly cited *Soldiers' Voting Bill*, 45 N. H. 618, where it is held "that in the computation of time from a date, or from the day of a date, the day of the date is to be excluded; but that where a computation is to be made from an act done, or from the time of an act, the day in which the act is done is to be included." To like effect are the cases of *Jacobs v. Graham*, 1 Blackf. 391, and *Chiles v. Smith's Heirs*, 13 B. Mon. 461. In the latter case the court says:

"It was decided by this court in the case of *Woods v. Patrick*, Hardin, 457, that in calculating the 30 days which were required by the statute to intervene between the lodging of the order and the commencement of the next term, to entitle the party to a change of venue, the day of depositing the order should be included. So, where process is required to be served a certain number of days before the term, the day on which the process was executed is reckoned as one of the days in the computation of the time."

Applying this rule, and the day of filing the reply and joining the issues, the day of an act done will be included. The authorities which rule that, where a statute provides it shall take effect "from and after its passage," or "from and after its publication," the date of its passage or publication is to be excluded, assent to the doctrine that a day is to be deemed an indivisible point of time, and therefore that the fractions of a day must be disregarded. Under these authorities, the words, "from and after its passage," or "from and after its publication," are words of exclusion, and this construction is largely given to the word "from" so as to avoid the old, harsh rule that a statute taking effect on the day of its passage or publication is to be deemed in force from the earliest moment of that day. These authorities also hold, that there is usually

no satisfactory means of ascertaining the exact hour of the passage or publication of the statute; hence, that it is public policy to hold that a statute shall not go into operation until the day after its passage or publication. (*Parkinson v. Bradenburg*, 35 Minn. 294.)

We are not in sympathy with the decisions ruling that courts of justice must not take cognizance of the fractions of a day. Lord Mansfield said:

“But though the law does not in general allow of the fractions of a day, yet it admits it in cases where it is necessary to distinguish. And I do not see why the very hour of the day may not be so too, when it is necessary and can be done; for it is not like a mathematical point which cannot be divided.”

In *Louisville v. Savings Bank*, 104 U. S. 469, Mr. Justice Harlan, speaking for the court, uses the following language:

“In view of the authorities, it cannot be doubted that the courts may, when substantial justice requires it, ascertain the precise hour when a statute took effect by the approval of the executive. In determining when a statute took effect, no account is taken of the time it received the sanction of the two branches of the legislative department, which sanction is as essential to the validity of the statute as the approval of the executive. We look to the final act of approval by the executive to find when the statute took effect, and, when necessary, inquire as to the hour of the day when that approval was, in fact, given.”

Sutherland on Statutory Construction says:

“The law takes notice of fractions of a day when necessary. The general principle declared by Lord Mansfield is believed to be sound, and established by the weight of authority, that, where it is necessary to justice and it can be done, the law takes notice of the parts of a day; then the precise time when an act is done may be shown. This necessity exists when an act is done on the same day that a legislative act is passed, if that statute, being passed, afterward should not affect such act, or, being passed before, should do so.” (§ 110, p. 133.)

In this case, the evidence clearly shows that said chapter 245 was published at 6 o'clock A. M. on the 20th of March, 1889. Therefore, following the great weight of authority

## Heizer v. Pawsey.

and the better reason, and taking notice of the fractions of a day, said chapter 245 went into operation "from its publication"—that is, from and after 6 o'clock A. M. of the 20th of March, 1889. The petition in error and præcipe were not filed until a much later hour during that day. They were not, in fact, filed until several hours after the publication of said chapter 245. That statute, therefore, was in full force at the time of the commencement of the proceedings in this court. As the amount in value in controversy in this action, exclusive of costs, is \$65 only, the proceedings in error cannot be retained in this court.

Defendant below had no vested right for an appeal or proceeding in error prior to the commencement thereof in this court. The appeal or proceeding in error was not had or taken until after chapter 245, Laws of 1889, was in force. Therefore, the proceeding in error in this case was filed too late to give this court any jurisdiction under the provisions of said § 542a (Laws of 1889, ch. 245) of the civil code. This proceeding does not come within any of the excepted cases of said chapter 245.

The proceedings must be dismissed at the cost of the plaintiff in error.

All the Justices concurring.

## D. N. HEIZER V. ELIZABETH PAWSEY.

**ARREST—Action on Bond—Appeal—Supersedeas.** The institution of proceedings in error in the supreme court, and the giving of a *supersedeas* bond, under §§ 551 and 552 of the code, will not prevent the plaintiff below from maintaining an action upon a bond given to secure the discharge of the defendant from arrest in the original case. A *supersedeas* bond only stays the execution of a judgment or final order sought to be reversed. (*C. B. U. P. Rld. Co. v. Andrews*, 34 Kas. 563, followed.)

3—47 KAS.

47	33
59	199
47	38
64	532

47	33
67	193

*Error from Barton District Court.*

THE opinion contains a sufficient statement of the nature of the action, and the material facts.

*Elrick C. Cole*, for plaintiff in error.

*James W. Clarke*, for defendant in error.

Opinion by GREEN, C.: This was an action upon a bond executed by the plaintiff in error, in an action commenced by the defendant in error against H. M. Fordham, in which an order of arrest had been procured. The bond sued on had been given in the district court of Barton county, to obtain the discharge of Fordham from arrest. The original suit of Elizabeth Pawsey against H. M. Fordham was prosecuted to judgment October 15, 1886, and the order of arrest was sustained by the district court. On the 24th day of January, 1887, H. M. Fordham filed in this court a petition in error and case-made, with a bond for costs, wherein he sought to have reviewed certain alleged errors in the case of Elizabeth Pawsey against H. M. Fordham, and filed a *supersedeas* bond on the 7th of March following, in the office of the clerk of the district court, to stay the issuance of an execution on the judgment rendered until that case could be determined in this court. This action was commenced after the filing and approval of the *supersedeas* bond, and was, therefore, pending in the district court of Barton county at the same time the original case was for hearing in this court.

It is contended by the plaintiff in error, that the approval of the undertaking, under §§ 551 and 552 of the code, stayed all proceedings until the cause should be finally determined in this court. The condition of the bond sued on was, that "the said H. M. Fordham should in his own proper person appear, if judgment should be rendered against him, and render himself amenable to the process of the court thereon." It was established that an execution was issued upon the judgment against the body of Fordham, and placed in the

## Opinion of the Court.

hands of the sheriff, who returned the same on the 5th day of March, 1887, indorsed: "Not found." This was done before the approval of the *supersedeas* bond. This action was commenced on the 7th day of May, 1887, but was not tried in the district court until the judgment in the original case of Pawsey against Fordham had been affirmed by this court.

It is insisted by the defendant in error that the pendency of the original suit in this court, without any stay bond having been filed until after the return of the execution, did not preclude the commencement of this action; that the return of the execution, as made by the sheriff, fixed the liability of the plaintiff in error under §§ 165 and 167 of the code; and that an action might be brought at any time after the liability had been fixed. This court has decided that the institution of a proceeding in error in the supreme court does not, of itself, operate to suspend further proceedings in the case in the court below; nor will the giving of the undertaking provided for in §§ 551 and 552 of the code suspend proceedings in the district court further than to stay execution of the judgment or final order sought to be reviewed. (*C. B. U. P. Rld. Co. v. Andrews*, 34 Kas. 563.) In the opinion the law is stated: "In none of the provisions of the code, however, is the undertaking made to stay any of the proceedings beyond the issuance of an execution to enforce the judgment or final order of the court below." That case settles the only question involved in this case in favor of the defendant in error. Proceedings against the bail could have been stayed under § 172 of the code, or ¶ 1930 of the General Statutes of 1889, upon proper application to this court.

It is recommended that the judgment of the district court be affirmed.

By the Court: It is so ordered.

All the Justices concurring.



E. E. MASTIN *et al.* v. I. H. LEVAGOOD.

1. **DANGEROUS MACHINE—Owners Liable for Loss of Hand.** When the owners of a horse-power threshing machine are guilty of gross negligence by leaving the bevel wheel and cogs uncovered, knowing them to be imminently dangerous to human life and limb in this uncovered condition, and a workman, engaged in threshing with the machine in this condition, attempts to oil the cylinder without the knowledge of the uncovered condition of the bevel wheel and cogs, and in this attempt loses his hand, the owners of the machine are liable for damages occasioned by such injury.
2. ——— *Duty of Actor.* In any voluntary act which may naturally result in the injury of another, the actor must see to it, at his peril, that injury does not follow, or he must respond in damages therefor.
3. ——— *Duty of Owners—Danger, Foreseen.* When danger is foreseen and pointed out to the owners of a threshing machine by the uncovered condition of the bevel wheel and cogs, a duty is imposed upon them to use every possible precaution to avoid injury to those engaged in operating the machine or working about it.

*Error from Marion District Court.*

ACTION by *Levagood* against *Mastin* and another, to recover damages for the loss of his hand. At the November term, 1888, judgment for the plaintiff for \$1,331. The defendants bring the case to this court. The opinion states the facts.

*Keller & Dean*, for plaintiffs in error.

*Grattan & Grattan*, for defendant in error.

Opinion by SIMPSON, C.: The plaintiffs in error were the two-thirds owners of a horse-power threshing machine, the other third being owned by the father of one of them. When they went to a farmer's for the purpose of threshing his wheat with their machine, they furnished two feeders, one man to drive the horse-power, and one man to measure the grain, it being the duty of the farmer for whom they were threshing to furnish pitchers, and the other necessary help. On the 16th day of September, 1886, the plaintiffs in error were en-

---

Opinion of the Court.

---

gaged in threshing grain for one Pampella, with a Nichols & Shepherd horse-power machine. E. E. Mastin was driving, and Jack Mastin was feeding. Galbreth, whom the Mastins brought to the Pampella farm to feed, had traded work with one Rankin, who was in the employment of Pampella, and Rankin was feeding. Galbreth was hauling grain away from the machine. York, an employé of the Mastins, was measuring the grain. This defendant in error was pitching from the stack, and he was an employé of Pampella. During the work, and at about 4 o'clock P. M. of the 16th of September, 1886, Jack Mastin was feeding and was taken sick, and called to Rankin to take his place. Rankin did so, and recollecting that he had not recently oiled the cylinder, and knowing that Jack Mastin was sick, called to the defendant in error, who was pitching grain from the stack to the feeder, to oil the cylinder. The machine in use was a vibrator, of the Nichols & Shepherd pattern. The large iron wheel revolves rapidly, and when so revolving the exposed bevel wheel and cogs are imminently dangerous to human life and limb. The manufacturers of the machine make a strong iron shield to be placed over the wheel and cogs, to render it safe to oil the cylinder or to do other work about it. In operation, the straw naturally lodges on, over and about the wheel and cogs, and conceals them, and makes it necessary, when any one is about to oil the cylinder, to remove the straw, and this is generally done with the hand. The shield had become so impaired that it was impossible to fasten it, or it would require great extra work to do so. It seems to be admitted that when the shield was not on, the wheel and cogs were imminently dangerous, and there is no question but that during the two days threshing at Pampella's, and at the time the defendant in error lost his hand, the shield was not on, and the wheel and cogs were uncovered, except as hidden by the straw. To oil the cylinder, one has to reach up and over the shield to get the oil cup, and when the shield is on it can be oiled without danger. When the shield is off, and one knows it, to avoid imminent peril, the oil can is reached in an opposite direction from that

---

Mastin v. Levagood.

---

used when the shield is on. The defendant in error, having inquired, was told where the oil can was, and went to the side on which the large iron bevel wheel is situate, at a point where the tumbling-rods connect with the horse-power, and the wheel revolves rapidly in cogs on the end of the cylinder, attempted to brush away the straw covering up the wheel, when his hand was caught in the cogs of the bevel wheel and was mashed. He brought this suit to recover damages for the loss of his hand, and was awarded \$1,331. The jury returned answers to special interrogatories as follows:

"1. Did not the plaintiff know, at and before the time he attempted to oil the cylinder, that the shield was off the bevel pinion? A. No.

"2. Did not the plaintiff know that it was dangerous, if it was dangerous, to attempt to oil the cylinder when the shield was off? A. No.

"3. Could not the plaintiff, in the exercise of ordinary prudence and care, have known that the shield was off? A. No.

"4. Would not the plaintiff have known that the shield was off if he had been ordinarily attentive to what he saw about the machine, and what he heard said by the defendants or others? A. Plaintiff did not know it was off.

"5. How much damage, if any, do you allow on account of the physical and mental suffering of the plaintiff? A. \$100.

"6. How much damage, if any, do you allow on account of the loss of plaintiff's hand? A. \$997.

"7. How much damage, if any, do you allow on account of plaintiff's expenditures for medicine and surgical services? A. \$130.

"8. What sum of money, if any, do you allow as exemplary damages? A. None."

The admitted fact is that the uncovered bevel wheel was very dangerous. It is established by the evidence, and there is no controversy as to the fact, that the owners of the machine knew that it was uncovered, that they had been warned of the dangerous consequences, and that they were guilty of gross negligence for using it in that condition. It is equally clear from the evidence, and the jury so find, that the defendant in error did not know that the bevel wheel was uncovered and that the shield was not on. Now, on this state of facts,

## Opinion of the Court.

separate and apart from any contractual relations, or any question as to the attitude of these parties as master and servant, the operation of this machine in its dangerous condition imposed a duty on the owners and operators thereof toward all who were engaged in the work, or who by any possibility, in the discharge of duty or in the performance of labor, might be brought in contact with it, that was certainly disregarded.

For it may be stated as a general rule, that where  
 2. Duty of actor any voluntary act may naturally result in the injury of another, the actor must see to it, at his peril, that injury does not follow, or he must respond in damages therefor, and this is true regardless of the motive or the degree of care with which the act is performed. (*Hay v. Cohoes Co.*, 2 N. Y. 159; *Tremain v. Cohoes Co.*, 2 id. 163; *Cahill v. Eastman*, 18 Minn. 324; *Phinizy v. Augusta*, 47 Ga. 260; *St. Peter v. Denison*, 58 N. Y. 416; *Wilson v. New Bedford*, 108 Mass. 261; *Scott v. Bay*, 3 Md. 431; *Cooper v. Randall*, 53 Ill. 24; *G. B. & L. Rly. Co. v. Eagles*, 9 Colo. 544.)

This rule applies to these plaintiffs in error in all its vigor. They operated the machine with the knowledge that the uncovered wheel was imminently dangerous to those working around it. They did this, too, after warnings that injurious consequences were liable to follow such use. The injuries resulting to the defendant in error were the natural and probable result of the use of this machine with the cogs and wheel in this uncovered condition. Its danger was fore-

3. Duty of owners—danger, foreseen.

seen and pointed out to the owners, and the duty was imposed upon them to adopt every possible précaution to avoid such a consequence. It seems clear to us, under the uncontradicted evidence respecting the danger of operating the machine in such manner, and of the knowledge of the Mastins of the danger, and of the want of knowledge on the part of the defendant in error that the wheel was uncovered, that the right of recovery is clear and undoubted. It was an

1. Dangerous machine—owners liable for loss of hand.

act of practical necessity that the machine should be oiled, as the business both of the Mastins and Pampella was to be ex-

---

Mastin v. Levagood.

---

pedited by it. The feeder, whose business or duty it was to oil when the other feeder was actively engaged at the mouth of the machine, was prostrate on the ground, sick and disabled. Anyone working about the machine, either for the Mastins or for Pampella, or for both, could be called upon to do this special work, but when called upon was entitled to have all the necessary protection to save him harmless while performing the special labor. We do not understand that there is any cast-iron rule that forbids a man who is engaged in pitching from the stack from attempting to oil the machine at the request of anyone whose duty it is to see that the machine is in proper working condition. The evidence in this particular case shows clearly that, if the shield had been on and the wheel covered, any person could have oiled the machine without any danger to life or limb; hence, the immediate, adequate and efficient cause of the injury is found in the fact that the wheel was negligently and knowingly left uncovered by these plaintiffs in error. Whatever intermediate acts may have been committed by Rankin or by other employés, the injury must rest for an efficient cause on this act of negligence of the plaintiffs in error. On general considerations growing out of the contract and the nature of the employment of the defendant in error, he was bound to do and perform, within reasonable limits, any ordinary act expediting the business in which all parties there present were engaged that might be requested or demanded of him. He was designated by some one in authority to pitch from the stack, and he was directed by one who had authority to feed the machine, and to see that it was running properly, and to oil the machine. Both of these acts and his faithful performance of them were necessary ones, and expedited the business of both the Mastins and Pampella, and resulted to their benefit. We do not understand that the defendant in error was either a volunteer or an intermeddler, in the common acceptation of the term. He was there as an employé of Pampella, to perform the labor assigned him, subject to the orders and directions of those who had charge of the various branches of the work. Pampella and the

Mastins were associated together for a common purpose, and to do a particular part of the work. In the absence of some special controlling direction, the duty of the defendant in error was to do and perform all acts requested of him that were reasonable and he was capable of doing to expedite the associated effort. If the shield had covered the wheel, it would have been a very ordinary act to have oiled the machine when directed to do so by the person that all agree was charged with the duty of seeing that it was properly oiled; hence, we regard all this contention about the defendant in error being a volunteer or intermeddler as having no force or bearing. He was rightfully there. It was a part of his duty, under his contract of employment, to do and perform all ordinary acts of which he was capable, and which he was directed to do by those having charge of the work, that was necessarily included in its practical operation. Hence it seems that there is a direct responsibility to him by reason of his rightful presence there, and his lawful participation in the work on the part of the Mastins, independent of the inquiry as to whether he was an employé of the farmer or the owners of the machine.

It seems to be an established fact in this case that the operation of the machine with the uncovered wheel was imminently dangerous, and this is equivalent to saying that the owners of the machine were guilty of gross negligence in its operation. The great bodily harm of some one working about the machine without the knowledge that the wheel was uncovered was the natural and almost inevitable consequence of such gross negligence. The uncovered condition of the wheel imposed upon its owners the exercise of the highest degree of caution. This increase of duty arose out of the nature of the business and the danger to others incident to the operation of the machine. The duty of exercising great caution by the owners of the machine did not arise out of the contract with Pampella to do his threshing, but grew out of the wrong being done by the use of an uncovered wheel, known by them to be imminently dangerous. The owner of a horse and cart who leaves them un-

---

Mastin v. Levagood.

---

attended in the street is liable for any damage which may result from his negligence. (*Lynch v. Nurdin*, 1 Adol. & E. [N. S.] 29; *Illidge v. Goodwin*, 5 Car. & P. 190.)

The owner of a loaded gun who puts it into the hands of a child, by whose indiscretion it is discharged, is liable for damages occasioned by the discharge. (*Dixon v. Bell*, 5 Maule & S. 198.) The general rule is, that damages for which a party is liable are those, and those only, which are the natural and necessary consequences of his acts. (*Kellogg v. Chicago Rld. Co.*, 26 Wis. 267; *Ryan v. N. Y. C. Rld. Co.*, 35 N. Y. 211.) There is this marked distinction between an act of negligence imminently dangerous and one that is not so: the guilty party being liable in the former case to the party injured, whether there was any relation of contract between them or not, but not so in the latter case. (*Colegrove v. Harlem Rld. Co.*, 6 Duer, 410; *Burk v. DeCastro*, 11 Hun, 357.) Where contractors entered into a contract to put a cornice on a mill, the mill-owners to furnish the necessary scaffolding, and the scaffolding furnished, being defective, fell and killed an employé of the contractors, the mill-owners were held liable because the injury was the natural consequence of their negligence in constructing the scaffolds. (*Coughtry v. Woolen Co.*, 56 N. Y. 128; *Cook v. Dock Co.*, 1 Hilt. 437; *Smith v. N. Y. C. Rld. Co.*, 19 N. Y. 130.) So, in this case, the injury to the defendant in error was the natural consequence of the gross negligence of the owners of the threshing machine in leaving the wheel with its imminently dangerous cogs uncovered. That it was dangerous to human life and limb, is unquestioned. That the Mastins knew it was, is conclusively established. Despite the warnings of friends and neighbors, they persisted in its use in this dangerous condition. The natural result of this gross negligence was the serious injury of the defendant in error. Their answer to his demand for damages is, that he was not their servant. This answer, addressed to a man who was there in the regular course of employment to aid the accomplishment of the very work for which the owners of the machine had brought it to the farm of Pampella, is not a sufficient

---

Opinion of the Court.

---

one. His duty was to do and perform such acts as assisted in the accomplishment of the common design. He did not direct the work, or had no right to, or was not appointed or selected for that purpose. His duties were assigned by those who had the controlling authority. His duty was obedience to the directions of those in authority, or to those who seemed from the ordinary course of affairs to be in authority. In obedience to a direction, a request or a command by one who was in actual control of the machinery, he attempted to oil the cylinder. The act attempted appears to have been one of absolute necessity, requiring immediate attention. It was an ordinary act, unattended with danger, that any reasonably prudent man could perform without injury, if it had not been for the gross negligence of the Mastins. Rankin, who made the request or gave the direction, was in sole charge of that part of the machinery about which the request was made and the direction given. He had been in charge for two days, with the knowledge, consent and approval of the owners of the machine. The writer of this opinion is clear in his conviction that, under these circumstances, Rankin was for all legal purposes the employé of the Mastins, in charge of this branch of the machinery, responsible for its successful operation, and fully authorized and empowered to do or cause to be done any act that was necessary for the accomplishment of that part of the work; that the defendant in error, by reason of his employment there, was subject to all reasonable orders and directions necessary to the safe conduct of the business by those in authority; that as a matter of law he was an employé of the Mastins to the same extent and to the same degree as if he had been directly employed by them; that the relation of master and servant was established between them by reason of his employment by Pampella to engage in the associated work of the Mastins and Pampella; that the Mastins are liable to him for injuries caused by their gross negligence because of said employment; and that they are liable both because they used this dangerous machinery, with the knowledge of its danger, and because they failed to exercise reasonable



---

The State *ex rel.* v. Burton.

---

care to protect an employé. The instructions of the court complained of, being in substantial conformity to these views, are not erroneous.

We recommend that the judgment be affirmed.

By the Court: It is so ordered.

All the Justices concurring.

---

THE STATE OF KANSAS, *on the relation of C. N. Sears, as County Attorney of Cheyenne County, v. J. C. BURTON, as County Clerk, etc., et al.*

1. CASE, *Followed.* The rule stated in *The State ex rel. v. Stock*, 38 Kas. 154, as to private judgments having no binding force where the state is attempting to enforce its laws, followed.
2. PLEA, *Bad.* The plea of a subsequent county-seat election held bad, upon the same authority.
3. ——— *Valid Statute.* The act entitled "An act to legalize a certain election in Cheyenne county, and to declare the town of St. Francis the permanent county seat of said county," approved February 5, 1891, is constitutional and valid.

*Original Proceeding in Mandamus.*

THE case is stated in the opinion, filed July 9, 1891.

C. N. Sears, county attorney, for The State; Edwin A. Austin, and S. W. McElroy, of counsel.

Webb & Lindsay, for defendants.

Opinion by GREEN, C.: This is an original proceeding in *mandamus*, brought by the county attorney, to compel the county officers named, of Cheyenne county, to remove their respective offices from St. Francis to Bird City, and to compel them to hold their offices at Bird City, as the permanent county seat of Cheyenne county. The alternative writ was allowed on the 2d day of February, 1891, and served on the

---

Opinion of the Court.

---

defendants on the 7th. The cause was submitted upon the facts stated in the alternative writ and answer. The facts material to the issue, as claimed by the plaintiff, are substantially as follows:

Cheyenne county was organized April 1, 1886, and Bird City was designated as the temporary county seat. An election was held on the 15th day of May, 1886, and Bird City received a majority of the votes cast for the permanent county seat. The county officers held their respective offices at Bird City until about the 1st day of March, 1889, when they removed their offices to St. Francis. The answer of the respondents was a justification of such removal and continuance of the county seat at St. Francis, upon three grounds: First, that the election on the 15th day of May, 1886, had been adjudged to be null and void; second, that there had been a subsequent election held in the county, on the 26th day of February, 1889, at which St. Francis received a majority of all the votes cast for the permanent county seat; and, third, that by an act of the legislature, approved February 5, 1891, St. Francis was declared to be the permanent county seat.

I. The plea of *res adjudicata* is stated in the answer to the alternative writ, as follows:

"That the election in Cheyenne county on the 15th day of May, 1886, so far as the location of the county seat was and is concerned, was duly and finally determined and adjudged against the relator, the state of Kansas, and all persons whomsoever, by the consideration and decree of the district court of Cheyenne county, in a certain proceeding duly commenced, pending and had in said court, wherein the state of Kansas, on the relation of Thomas J. McCarty and R. M. Jacques, citizens, electors and tax-payers of the town of Wano, were plaintiffs, and Edwin M. Phillips, clerk of district court of Cheyenne county, was defendant, in the nature of *mandamus* to compel said Edwin M. Phillips, as such clerk, to remove his office from the town of Bird City, where he was unlawfully keeping his office, and to keep the same at the town of Wano, now St. Francis, which said last-named place the relators alleged to be the county seat of said county, and in which the said relators sought to, and did, contest the

pretended election held May 15, 1886, and the result thereof as declared by the board of county commissioners of said county, upon which election and result relator herein relies in this action and proceeding. It was duly and finally adjudged by said court, that said pretended election was null and void, and that no town was and had been chosen as permanent county seat of said county at said election."

The plea cannot be sustained in this case, which is brought upon the relation of the county attorney. The state is not bound by a suit prosecuted by a private party, in an action of this kind. (*The State ex rel. v. Stock*, 38 Kas. 154.)

II. The second plea of justification may be briefly stated :

"That afterward, on January 19, 1889, upon a petition of a sufficient number of the electors of said county whose names appeared on the last assessment rolls of the township assessors of the county, filed with the county clerk of said county, the board of county commissioners, acting on said petition, called an election to be held February 26, 1889, for the purpose of permanently locating the county seat of said county; that notice of said election was duly published by the county clerk on January 24, 1889, and weekly thereafter, in a newspaper published and of general circulation in said county; that notice of said election was also duly published by the sheriff of said county on January 31, and weekly thereafter until said election, in a newspaper published and of general circulation in the county; that afterward, on January 28, 1889, the board of county commissioners duly appointed certain persons to fill vacancies existing in the board of registrars for the several voting precincts in said county; that registration of the voters in the manner provided by law, by the persons authorized by law to act as judges of election in the several election precincts in said county, was had, and, in pursuance of said proceedings of said board of county commissioners and said notice of said election, an election was held in said Cheyenne county, on February 26, 1889, for the purpose of permanently locating the county seat of said county; and at said election, and by the result thereof as canvassed, the city of St. Francis received a majority of all the legal votes cast at said election, as was duly declared by the board of county commissioners sitting as a board of canvassers of the election returns of said election in said county."

We think this plea is bad. Taken in connection with the

first, it appears that the state was not bound by the judgment of the court which declared the first election void; hence, it is not clear that there was any authority for calling the second election. The judgment and decree of the district court of Cheyenne county, upon the relation of two citizens, against the clerk of the district court, was not sufficient ground for ordering another election. The first election must be set aside by some competent authority by which the state is bound, before another election could be ordered; and the subsequent election, having been held within five years, was unauthorized.

"No election for the relocation of such county seat shall be ordered or had within five years from the time of the holding of the last preceding election, touching the location or relocation of such county seat." (Gen. Stat. of 1889, § 1897.)

III. The following act of the legislature is set up as the third plea of justification:

"AN ACT to legalize a certain election in Cheyenne county, and to declare the town of St. Francis the permanent county seat of said county.

"WHEREAS, On the 26th of February, 1889, there was held in the county of Cheyenne an election for permanently locating the county seat of said county, at which election the town of St. Francis received a majority of 292 votes; and

"WHEREAS, The county of Cheyenne now owns in said town of St. Francis a block of land of the value of \$4,000, and county buildings thereon of the value of \$3,000; and

"WHEREAS, It is claimed by rival town-site companies that said election was illegal, and there is likely to arise in said county a contest over the permanent county seat thereof, to the great detriment of the people and tax-payers of said county: now, therefore,

"Be it enacted by the Legislature of the State of Kansas:

"SECTION 1. That the said election for the purpose of permanently locating the county seat of Cheyenne county, held February 26, 1889, be and the same is hereby legalized, and the town of St. Francis is hereby declared to be the permanent county seat of said county.

"SEC. 2 This act shall take effect and be in force from and after its publication in the official state paper.

"Approved February 5, 1891.

"Published in official state paper February 6, 1891."

It is contended by the relator, that this act is void and unconstitutional, because it is in contravention of § 1, art. 9, of the constitution, which says:

“But no county seat shall be changed without the consent of a majority of the electors of the county.”

It is argued with a great deal of force that the consent required by the constitution must be affirmatively given; that the election held on the 26th day of February, 1889, was a nullity; and, therefore, the legislature had no power to legalize such a nullity. Let us examine this proposition. The constitutional restriction placed upon the legislature is, that it cannot change the location of a county seat without the consent of a majority of the electors of the county. It is true the legislature has said that, when a county seat has been located, no other election shall be had within five years of the time of the holding of the last election. Yet it could dispense with this rule and provide for the holding of an election at any time. It is a matter peculiarly within the power of the legislature to say when and how county-seat elections shall be held. If it be within the power of the legislature to prescribe the rule for such elections, can it not by subsequent legislation legalize an election which was lacking in one of the requisites which it might have dispensed with by a previous act? The law has been stated by Judge Cooley:

“If the thing wanting or which failed to be done and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute, and if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law.” (Cooley, Const. Lim. [6th ed.] 457.)

This court has said that, where an irregularity rendering an act of a city or subordinate agency illegal or void is simply a failure to comply with some provision of the statute which

## Opinion of the Court.

the legislature might in advance have dispensed with, the legislature can, by a general curative statute, subsequently passed, dispense with such compliance, and thereby render the act of the city or subordinate agency legal and valid. (*Mason v. Spencer*, 35 Kas. 512.)

Again, this court has said, in speaking of county-seat elections, that a vote of a majority is not necessary, nor even the formality of an election. The consent of a majority of the electors, in whatever form expressed, whether in election or by petition, or otherwise, is sufficient. (*County Seat of Linn Co.*, 15 Kas. 530.) Now, the fact exists that an election was held in Cheyenne county on the 26th day of February, 1889. It may not have been authorized, but it is admitted by the pleadings that an expression was given upon the question of the location of the county seat in that county. Was not this sufficient for the legislature to consider as a consent, within the spirit of §1 of article 9 of the constitution? We need not call it an election, for that is not necessary; the consent may be expressed by petition, or in any other form. We do not know what was before the legislature, and can only resort to the preamble and the act itself to determine the object of the legislature. With this existing fact before us, of an expression having been given by the people of Cheyenne county upon the question of the location of the county seat, we cannot say that the legislature acted upon an absolute nullity. There was something expressed, which it regarded as a consent; and upon that consent based its action, by passing the law in question. The proposition may be summarized: An election was held on the 15th day of May, 1886, locating the county seat at Bird City. The people of the county subsequently expressed themselves in favor of St. Francis as the county seat, but in a manner not authorized by law at the time; but the defect in such expression was a matter which the legislature might have dispensed with in the first instance. The defect, therefore, was such an one as the legislature could and did cure by a subsequent enactment, which we are constrained to uphold.

Brown v. Irwin.

---

We therefore recommend that the peremptory writ of *mandamus* be denied.

By the Court: It is so ordered.

All the Justices concurring.

---

JOHN C. BROWN v. W. H. IRWIN.

1. **TRESPASS**—*Local Action*. The action of trespass to real estate is a local action.
2. ——— *Bill of Particulars—Practice*. Where a bill of particulars states an action in trespass *quare clausum fregit* only, and the bill of particulars also shows that the action arose in the state of Nebraska, it is error to overrule a demurrer to such bill of particulars on the ground that it does not state a cause of action.

*Error from Norton District Court.*

THE opinion states the case.

*J. R. Hamilton*, for plaintiff in error.

*C. D. Jones*, for defendant in error.

Opinion by STRANG, C.: This was an action on appeal from the judgment of a justice of the peace. The bill of particulars contained two counts—the first one stating a cause of action in trespass upon real property, arising in the county of Norton and state of Kansas; the second count stating a cause of action in trespass to real property, arising in the county of Furnas and state of Nebraska. The defendant demurred to the first count, and also separately to the second count of the bill of particulars. The demurrer to each count was overruled, and exceptions allowed. The case was then tried by the court and a jury, resulting in a general verdict for the plaintiff against the defendant for the sum of \$10, upon which the court entered judgment for that amount, and costs of suit.

---

Acker v. Warden.

---

amounting to \$61.10. A motion for new trial followed, and was overruled, and the defendant below brings the case here for review, and alleges that the court erred in overruling his demurrer.

We think the court erred in overruling the demurrer to the second count of the bill of particulars. This count stated a cause of action in trespass to real estate arising in the state of Nebraska. The action of trespass to real estate is a local action. (*Sumner v. Finegan*, 15 Mass. 280, 284; *Livingston v. Jefferson*, 19 Am. Rep. 400; Cooley, Torts, 471, 472.)

The cause of action stated in the second count having arisen in the state of Nebraska, and being a local action, the courts of Kansas could not take jurisdiction of the same, and therefore the demurrer to the second count should have been sustained. The verdict is general upon both counts. The judgment follows the verdict. It must be reversed. It is so recommended

By the Court; It is so ordered.

All the Justices concurring.

---

D. W. ACKER *et al.* v. JAMES S. WARDEN.

**NOTE—Consideration—No Fraud to Bar Recovery.** Where a surety was induced to renew a note upon the representation of the payee that the consideration of the original note was for money paid to the principal maker over the counter of a bank by the payee, when in fact the consideration was for money paid by the payee for the benefit of the principal maker to another party for the purchase-price of an interest in a patent-right, *held*, that no such fraud or deceit is shown as to bar the recovery on the note by the the payee against the surety.

*Error from Marshall District Court.*

ON the 23d day of July, 1883, *D. W. Acker* and *J. F. Watson* brought their action against *James S. Warden*, to recover as damages \$3,000. In their petition they alleged that



one W. H. Gibbs was the owner of a patent-right for the state of Kansas of an improvement in a dairy churn, originally issued to W. W. Sanborn, of Clinton county, Iowa; that Warden induced Frank W. Alvord, on September 21, 1880, to purchase the undivided one-half interest in the patent from W. H. Gibbs, for the state of Kansas, excepting certain counties; that he induced Alvord to execute his promissory note therefor in the sum of \$500, and also induced the plaintiffs to sign the same as sureties; that Warden then and there promised he would buy the remaining undivided one-half interest in the patent-right for \$1,000, and would pay that sum for the same; that the representations of Warden about buying the undivided one-half interest for \$1,000 were wholly false, and known to him to be false; that W. H. Gibbs, without any consideration, on the 17th day of September, 1880, conveyed to Warden the undivided one-half interest in the patent-right; that the conveyance was made solely for the purpose of cheating and deceiving these plaintiffs as to the value of the patent-right, and as to the amount that Warden was to pay therefor. They further alleged in their petition, that on September 21, 1880, the date of the execution of the note of \$500 by Alvord and themselves, Warden represented to Alvord that the patent-right was a new, novel and useful invention, and an improvement of great value; that large sums of money could be made from the sale thereof; but that in fact the patent-right was utterly worthless and of no value whatever, and possessed neither novelty nor utility, and that Warden well knew this at the time he made all the foregoing representations, and so induced Alvord and these plaintiffs to sign and deliver the note of \$500 on September 21, 1880. The petition also alleged that, on the 28th day of November, 1881, Warden induced the plaintiffs to execute a renewal of the note, upon the statement that Alvord had borrowed \$500, and that the first note had been executed for that amount of money, which he had paid to Alvord over the counter of his bank; that all of these representations were false, and known by Warden to be false, at the time they were made; that

---

Opinion of the Court.

---

Warden assigned and sold the note to the Exchange National Bank, of Atchison, in this state; and that, on the 18th of July, 1883, a judgment was rendered in favor of the bank and against them as principals on the note, for the sum of \$532.50, which they will have to pay.

The defendant, James S. Warden, in his answer denied generally the averments of the petition, and alleged that he did not assign or transfer the second note until after its maturity, and that, in an action brought by the bank upon the note, judgment was recovered against the plaintiffs upon personal service, and that therefore the plaintiffs have no cause of action whatever against him. The plaintiffs filed a reply, denying that the promissory note described in their petition was assigned, transferred or sold to the Exchange National Bank, of Atchison, before it became due. Trial had on the 2d day of September, 1885, before the court with a jury. After plaintiffs had introduced all of their evidence, the trial court sustained a demurrer filed thereto by the defendant, and rendered judgment for costs in favor of the defendant and against the plaintiffs. The plaintiffs excepted and bring the case here.

*W. A. Calderhead*, for plaintiffs in error.

The opinion of the court was delivered by

HORTON, C. J.: The material facts in this case are as follows: W. W. Sanborn, of Iowa, obtained on the 21st day of May, 1867, letters-patent from the United States for certain improvements in dairy churns. Prior to 1880, the right to sell and use this patent in Kansas was purchased by W. H. Gibbs. In September, 1880, Alfred Hill and Frank W. Alvord purchased of Gibbs an undivided half of the patent-right for the state of Kansas, excepting a few counties, for \$1,000, and James S. Warden purchased the other undivided half for \$500. In paying for his undivided quarter, Alvord executed his note of \$500 to James S. Warden, dated September 21, 1880, and due 120 days after date, bearing 12 per cent. interest after maturity. J. F. Watson and D. W. Acker

---

Acker v. Warden.

---

signed this note as sureties for Alvord. When the note became due it was not paid, and on November 28, 1881, the note was renewed by Watson and Acker, payable eight months after date. George C. Brownell also signed this note. Subsequently, the note was sold and indorsed by James S. Warden to the Exchange National Bank, of Atchison. On the 16th day of March, 1883, the Exchange Bank brought its action against Watson, Acker, Brownell and Warden upon this note, and, upon personal service, obtained judgment against all the parties. On the 23d of July, 1883, this action was commenced by Acker and Watson against Warden for damages, alleging fraud and deceit on the part of Warden in procuring both of these notes referred to. Upon the trial, after the plaintiffs had introduced all of their evidence, the defendant interposed a demurrer thereto, which was sustained by the court. The plaintiffs excepted, and bring the case here for review.

It is claimed that Acker and Watson were induced to sign the note of Alvord to Warden of \$500 on September 21, 1880, by the false representations of Warden. They claim that he promised to purchase and pay \$1,000 for an undivided half of the patent-right; second, that he represented that the sale of the patent-right for two counties in Kansas had been made, which would nearly pay the note; and, third, that he stated the patent-right was valuable and useful, when it was worthless and of no value whatever. It is also claimed that the evidence shows that Warden purchased the patent-right for Kansas on September 17, 1880, prior to the time that Alvord executed any note, or had purchased any part thereof. It appears, from the evidence produced upon the trial, that Warden never had any conversation with Acker and Watson prior to their signing the note of September 21, 1880; therefore he did not personally by any representations or promises induce them to become the sureties of Alvord. Alvord made some such representations to Acker and Watson, which he said Warden had made to him, and it appears that Warden did make some such statements to Alvord. It is clearly appar-

## Opinion of the Court.

ent, however, from Alvord's own statements, that the pretended sales of the patent-right, prior to his purchase, were not relied upon by Alvord, because he cannot remember the amount; and his other evidence shows that he was eager to make the purchase of a quarter interest in the patent-right, if he could raise the purchase-price, or could give a good note therefor. It is evident that Alvord, after a short examination of the dairy churn in operation, and his conversation with Warden, was induced to believe that the patent-right was a valuable one, and that, if properly operated, he could make money out of it. He also was induced to buy an interest in the patent-right because he thought that Warden was a first-class business man and would not take an interest if the patent was not all right. The amount that Warden was to pay for an undivided half was not so important to Alvord as the fact that Warden thought the patent-right of so much value as to become interested therein and the owner of an undivided half thereof. Alvord testified, among other things, as follows:

"Ques. How long were you engaged in examining the patent churn? Ans. Why, not a great while. I think at the time I first saw it he was in the act of churning.

"Q. You thought it was a pretty good thing? A. Yes, sir.

"Q. And made up your mind, as I understand you to say, that you would take an interest in it if you could put up your part of the money or the security? A. Yes, sir.

"Q. Did you have considerable talk with Mr. Gibbs about the operation of the churn? A. Not a great deal; no. I had a considerable talk with him as to dealing in patent-rights.

"Q. Did you see the churn operate yourself there at the fair grounds? A. Yes, sir.

"Q. You saw, then, that you believed it was capable of going? A. Yes, sir.

"Q. And you, in the exercise of your own good judgment, thought it was a pretty good thing at that time? A. Yes, sir.

"Q. And after that you had a talk with Warden, I understand you, and he told you to get security on this note for \$500, subsequent to that time? A. Yes, sir.

"Q. Now, at the time you spoke to Acker and Watson, had they any knowledge about your purchasing this patent-right, so far as you knew? A. Yes, I think they had.

## Acker v. Warden.

"Q. Previous to that time? A. Yes, I think they did.

"Q. They knew what this note was for? A. Yes.

"Q. They knew that you had given this note for an interest in this patent-right? A. Yes, sir.

"Q. You explained to them fully what you wanted it for, and asked them to go your security? A. Yes, sir.

"Q. They had no interest in the patent-right themselves? A. No, sir.

"Q. They were simply accommodating you by indorsing your note? A. Yes, sir.

"Q. That was the way you understood it? A. That was the understanding.

"Q. And I understand you to say that Mr. Warden was not present when they signed this note? A. No, sir; he was not.

"Q. They signed this note upon your request and upon your solicitation alone? A. Yes, sir.

"Q. After these papers were fixed up you started out to sell these patent-rights? A. Yes, sir.

"Q. You sold how many rights? A. I sold two.

"Q. What did you receive for them? A. I received \$160 for one right, and I traded the right of Clay county for a man's interest in a timber claim.

"Q. Did you afterward sell the timber claim? A. No, sir; I traded him, besides, a horse or pony that I had.

"Q. What was the timber claim worth? A. Well, I don't know.

"Q. You got \$160 in money for the other? A. I couldn't have got anything for it, I suppose; I tried to.

"Q. You abandoned it, did you? A. Yes, sir.

"Q. Did you make any other sales? A. No, sir.

"Q. Was that the money you realized? A. That was all the money I realized.

"Q. And at Valley Falls, after you had attempted to manufacture this churn unsuccessfully, you threw up the business? A. Yes, sir.

"Q. Subsequent to that, you and Acker and Watson were sued on the note, were you not, in this court? A. I believe we were."

The evidence of W. H. Gibbs shows that he sold the patent-right to Hill, Alvord, and Warden; that an undivided half was for Hill and Alvord, and the other undivided half for Warden; that Warden advanced the money for the undivided half purchase by Hill and Alvord, less the discount,

---

Opinion of the Court.

---

and that Warden paid the balance of the \$1,500 for which the whole patent-right was sold for Kansas, excepting a few counties. His evidence also shows that the patent-right purchased by Hill, Alvord and Warden is a good and useful invention, and in skillful hands works well. All of the evidence tends to show that Warden believed the patent-right a valuable one, and also believed, at the time he associated with him Hill and Alvord in the purchase of it, that money could be made in the sale of the patent-right in Kansas. There is no evidence showing or tending to show that Warden ever supposed or believed that the patent-right was worthless. It did not appear upon the trial that either Acker or Watson was induced to sign the first note by the fraud or deceit of Warden. The renewal, or second note, which was given to take up the first note, was executed long after all the foregoing facts were known to Alvord and Watson, and the only false statement which is alleged against Warden concerning the execution of the second note is the statement or representation that Alvord got \$500 from him at his bank on the first note. The evidence shows that the amount of this note, less discount, was turned over by Warden to Gibbs; and, although Alvord did not in person obtain \$500 at the counter of Warden's bank, yet the \$500, less discount, in money was actually paid to Gibbs by Warden for the benefit of Alvord. Warden may have made some statements in the matter which were not wholly true, but it is not every false statement that is actionable. It is immaterial whether Warden had paid to Alvord at his bank counter the \$500, or had paid it to Gibbs for Alvord. (*In re Cameron*, 44 Kas. 64.) As Gibbs sold the patent-right for \$1,500, it is possible that Alvord paid more than he ought to have paid for an undivided quarter, or that, on account of the payment of \$500, he is entitled to a larger share than an undivided quarter of the patent-right; but no such fraud or deceit is shown as to entitle the plaintiff to recover upon the testimony disclosed.

The judgment of the district court will be affirmed.

All the Justices concurring.

LULU M. HOWBERT *et al.* v. VALENTINE HEYLE.

1. **EJECTMENT—Action, Barred.** Where a person has been in the actual and exclusive possession of real estate, claiming to be the owner thereof under a guardian's sale and deed, for more than 15 years, and the minor whose land was sold and conveyed, and who is a female, attained her majority in the meantime by arriving at the age of 18 years, and also in the meantime permitted more than two years after attaining her majority to elapse before she commenced any action to disturb the possession of the person holding under the guardian's sale and deed or to question his ownership with regard to the land, *held*, that any cause of action which she might have had because of such adverse possession and claim of ownership is barred by the 15-years' statute of limitations. (Civil Code, § 16, subdiv. 4.)
2. **GUARDIAN—Acts, Valid against Collateral Attack.** Where letters of guardianship are issued and recorded in the probate judge's office, and the guardian gives bond and duly qualifies and enters upon the discharge of his duties as guardian with the approval of the probate judge, and all this is of record, the guardian's acts will be held valid when attacked collaterally, although there may not be any further record in the probate judge's office of his appointment.
3. **PETITION, Sufficient against Collateral Attack.** Where a petition by a guardian to sell certain land belonging to his ward states, among other things, that the ward had no money or personal property, and that it was to his interest and necessary for his support and education that the land should be sold, and describes the land as being an undivided one-twelfth interest "in the following-described real estate, to wit, the southeast quarter of section 32, range 17, township 12," without stating specifically in what county or state the land was situated, or whether in range east or west, or township north or south, but land answering to the aforesaid description was in fact situated in Shawnee county, where all the parties interested resided, and where all the proceedings were had, *held*, that the petition must be held to be sufficient when the sale under it is many years afterward attacked collaterally.
4. — — **Sufficient against Collateral Attack.** Where the petition and notice for the sale by a guardian of his ward's real estate are each signed by the guardian and served upon the minor by an individual who is not an officer, and the proof of the service is shown by the affidavit of the person who served the same, and all were filed in the probate judge's office, and the probate judge, as well as the district court, found that the service was sufficient, *held*, that the supreme court must also consider it sufficient, and especially so where the service is attacked only in a collateral proceeding.

## Opinion of the Court.

5. ——— *Service in Due Time.* Where the aforesaid petition and notice were served on April 18, and the hearing was to be had and was had on April 28, *held*, that the service was at least 10 days prior to the time fixed for the hearing, within the meaning of the statute.
6. *VALID SALE; Case, Followed.* The failure of a guardian to give security, as required by § 15 of the act relating to guardians and wards, will not render void a sale regularly made and approved; following *Watts v. Cook*, 24 Kas. 278.
7. *IRREGULARITIES—Sale and Deed Deemed Valid.* Other irregularities mentioned, and *held* not to invalidate the guardian's sale and deed, when the same are attacked in a collateral proceeding.

*Error from Shawnee District Court.*

**EJECTMENT.** The material facts are stated in the opinion. Judgment for defendant, *Heyle*, on March 22, 1888. The plaintiffs, *Howbert* and another, bring the case to this court.

*E. E. Chesney, G. W. Carey, and Hollister & Hollister*, for plaintiffs in error.

*James J. Hitt*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action in the nature of ejectment, brought in the district court of Shawnee county by Lulu M. Howbert and George Howbert against Valentine Heyle, to recover the undivided two-twelfths of a certain quarter-section of land hereafter described. A trial was had before the court without a jury, and the court made certain findings of fact and conclusions of law, and upon such findings and conclusions rendered judgment in favor of the defendant and against the plaintiffs; and the plaintiffs, as plaintiffs in error, bring the case to this court for review.

It appears that in 1869 George W. Howbert owned the undivided two-thirds of the aforesaid quarter-section of land, to wit, the southeast quarter of section 32, township 12, range 17, in Shawnee county; and that while owning the same, and in 1869, he died intestate, leaving as his heirs, his wife, Martha, and four children, Dora, Augusta, Lulu M., and George. After his death, and on November 6, 1869, Joseph A. Deit-



---

Howbert v. Heyle.

---

rich was appointed and he gave bond and duly qualified as the guardian of Dora, Lulu M., and George; they at the time being minors. Afterward, and on June 6, 1870, the guardian sold the interest of the aforesaid minors in the aforesaid quarter-section of land to Valentine Heyle for the sum of \$357, which sale was immediately confirmed, and a guardian's deed executed and recorded, and Heyle took the immediate possession of the land, all on June 6, 1870, and he has been in the actual and continuous possession of the land ever since, claiming exclusive ownership therein adverse to the plaintiffs and to all others. This action was commenced on October 16, 1886. The defendant in his answer denied generally all the allegations of the plaintiffs' petition except as to his (the defendant's) possession, and also pleaded the 15-years' statute of limitations. (Civil Code, § 16, subdiv. 4.)

The first question arising in the case upon the pleadings and the evidence is, whether or not the plaintiffs' action is not barred by the aforesaid 15-years' statute of limitations. One of the plaintiffs, Lulu M. Howbert, was born on June 16, 1866; hence she arrived at 18 years of age and attained her majority on June 16, 1884, (Act relating to Minors, § 1,) and the two years given her by § 17 of the civil code after her disability of minority was removed within which to commence her action expired on June 16, 1886, just four months prior to the commencement of this action; hence her present action is barred by the aforesaid 15-years' statute of limitations. Lulu's action would also be barred by the five-years' statute of limitations relating to real property claimed under a guardian's sale and deed, (Civil Code, § 16, subdiv. 2,) if such sale and deed were only voidable and not absolutely void, for she had more than five years after her supposed cause of action accrued, and more than two years in addition thereto after she attained her majority, before she commenced this action. This five-year statute of limitations, however, was not pleaded, but as this is an action in the nature of ejectment, it may be considered in determining the rights of the parties under the general plead-

1. Ejectment—  
action,  
barred.

## Opinion of the Court.

ings without any special plea of the statute, if the sale and deed were only voidable and not utterly void. The aforesaid statutes of limitations, however, do not apply to the other plaintiff, George Howbert, for he did not attain his majority until within less than one year before the commencement of this action, and he then attained the same by a proceeding in the district court. Nor can either of the plaintiffs recover in this action if the aforesaid sale and deed were only voidable and not void; for this is purely a collateral attack upon them and not a direct attack. As to Lulu Howbert, the judgment of the court below must of course be affirmed, for the reason that her cause of action was barred under the 15-years' statute of limitations before this action was commenced.

As to George Howbert, however, it will be necessary to consider the case further, in order to ascertain whether the guardian's sale and deed were and are utterly null and void or not. If they are only voidable, they cannot be attacked in this proceeding, for the reason that such attack is only collateral, and is not direct. Counsel for the plaintiffs claim that such sale and deed are utterly null and void. Indeed, they claim that all the proceedings in the probate court with reference to the guardianship and everything done under the guardianship are utterly null and void. Going into particulars, it is claimed that there is no record in the probate court showing the appointment of the guardian. The court below, however, found as a fact that the guardian was duly appointed on November 6, 1869, and that he gave bond and duly qualified. This was the bond required by § 3 of the act relating to guardians and wards. It is also shown by the evidence and found by the trial court, that letters of guardianship were duly issued by the probate judge to the guardian, Joseph A. Deitrich, and that such letters were duly recorded by the probate judge in

2. Guardian—  
acts, valid  
against collat-  
eral attacks.

the records of his office, and Deitrich afterward, with the approval of the probate judge, acted as such guardian. This is certainly sufficient. The case of *Higginbotham v. Thomas*, 9 Kas. 328, has but little if any application to this case, and is not controlling.

It is further claimed by the plaintiff in error, that the petition of the guardian to sell the land of the plaintiffs is insufficient: First, because it does not state facts, but only conclusions and inferences; and, second, because it does not give a sufficient description of the land to be sold.

3. Petition, sufficient against collateral attack.

We think the petition is amply sufficient when attacked collaterally, as it is now attacked. It stated that the minors had no money or personal property, and that it was to their interest and necessary for their support and education that the land should be sold; and it described the land as the one-twelfth interest of each of the minors "in the following-described real estate, to wit: The southeast quarter of section 32, range 17, township 12." The objection to this description is, that it does not state in what county or state the land is situated, nor whether in range east or west, or township north or south. The land, however, is situated in Shawnee county, and the aforesaid description of it is perfect except as to the omissions complained of; all the parties interested in the land resided in that county; all the proceedings were had in that county; and in all the other proceedings the description of the land was complete; and no person could have been misled as to where the land is situated. We think the description was and is sufficient when attacked collaterally, as in this case. The case of *Cohen v. Trowbridge*, 6 Kas. 385, has but little if any application to this case, and is not controlling.

It is also claimed that no sufficient service of the petition to sell the land and the notice of the hearing thereof was ever made upon the minors: First, because no notice at all was ever served upon them; second, because the petition accompanying the notice was not sufficient as above stated; third, because the petition and notice were not served upon the minors by a proper person; and, fourth, because the service was not made a sufficient length of time prior to the hearing of the application to sell the land. Section 12 of the act relating to guardians and wards reads as follows:

"SEC. 12. The petition for that purpose must state the

grounds of the application, must be verified by oath, and a copy thereof, with a notice of the time at which such application will be made to the court, must be served personally upon the minor, if a resident of this state, at least 10 days prior to the time fixed for such application."

It will be noticed that the statute provides for serving a copy of the petition, "with a notice of the time at which the application will be made," and does not provide for the service of a summons, or a writ, or an order, or any kind of process issued by a court, or coming within the meaning of § 1, chapter 38, of the Laws of 1869. (General Statutes of 1889, ¶ 2120.) The notice and the petition were each signed by Joseph A. Deitrich, the guardian, and both were actually served upon the minors by Elias B. Williams, and the notice and petition and the affidavit of service by Elias B. Williams were filed in the probate judge's office, and

4. Sufficient  
against collat-  
eral attack.

are among the files of the probate court; and this we think is sufficient. Both the probate court and

the district court have expressly found that the service was made, and that it was sufficient; and we think the findings were made upon sufficient evidence. The petition and notice were served on April 18, 1870, and the hearing was to be had and was had on April 28, 1870. We think the notice was

5. Service in due  
time.

served "at least 10 days prior to the time fixed for such application," within the meaning of the statute, and in accordance with all the decisions of this court upon similar questions. (*Schultz v. Clock Co.*, 39 Kas. 334; *Northrop v. Cooper*, 23 id. 432; *The State v. Eggleston*, 34 id. 719; *Dougherty v. Porter*, 18 id. 206; *Neitzel v. Hunter*, 19 id. 221; *Warner v. Bucher*, 24 id. 478.)

The case of *Garvin v. Jennerson*, 20 Kas. 371, has no application to this question, for the reason that the statute there commented on required that the act to be done should be done "at least one day before the day of trial," and not at least one day before the trial. One clear day besides the fractions of the first and the last days was there intended. If the statute in the present case had required the service to be made at least

10 days prior to the day on which the hearing should be had, instead of providing as it does, it would have presented a very different question. The decision which we now make with respect to the petition and notice does not contravene anything decided in the case of *Mickel v. Hicks*, 19 Kas. 578.

It is further claimed by the plaintiffs in error, that it was also found by the trial court that the guardian never gave the bond required by §15 of the act relating to guardians and wards, and it is therefore claimed, for that reason especially, that all of the proceedings with respect to the sale and conveyance of the plaintiffs' land were and are void. This court, however, in the case of *Watts v. Cook*, 24 Kas. 278, has decided otherwise. In that case this court decided that "the failure of a guardian to give security, as required by §15, chapter 46, (Comp. Laws of 1879,) upon obtaining an order for the sale of real estate, will not render void a sale regularly made and approved." It is now the opinion of the writer of this opinion that that case was decided wrongly and against the great weight of authority, but it was decided nearly 11 years ago, and has possibly to some extent become a rule of property, and it is not against all authority nor all reason; but there are cases in Ohio, Pennsylvania and Iowa which seemingly sustain it. (*Mauarr v. Parrish*, 26 Ohio St. 636; *Arrowsmith v. Harmoning*, 42 id. 254; *Lockhart v. John*, 7 Pa. St. 137; *Merklein v. Trapnell*, 34 id. 42; *Thorn's Appeal*, 35 id. 47; *Dixey's Executors v. Laning*, 49 id. 143; *Bunce v. Bunce*, 59 Iowa, 533.) It is therefore now believed by this court, or at least by a majority of its members, that we should follow our former decision upon this subject, and we shall do so; and therefore the point made by the plaintiffs in error with reference to this subject will be overruled.

Other irregularities are mentioned by the plaintiffs in error, but we hardly think that they require any comment. They claim that the minors did not receive any of the money paid by Heyle for the land. That, however, was not his fault. He paid it to the guardian, and the guardian loaned

## Opinion of the Court.

all but \$100 thereof to the minors' stepfather, with whom they resided, and he has never returned it to the guardian or accounted for it. In all probability, however, their board, clothing and education cost more than all the money of theirs which their stepfather received. But this is immaterial. It is also claimed that the sale of their property was procured through fraud, but there is but little, if anything, to sustain this claim, and the court below must have found against them. Certainly there is nothing that shows that Heyle defrauded the plaintiffs or desired to do so; and the entire proceedings, from the beginning up to the time when the guardian's deed was executed to Heyle, were approved by the plaintiffs' mother, their stepfather, their guardian, and the probate judge, and there is nothing really to show that any of these persons during any part of that time intended or desired to defraud the plaintiffs. It is also claimed that there are some discrepancies as to dates. We have examined this, and it is unfortunate that they occur, but there is enough in the record to indicate in every instance what was the true date, and hence they cannot render the proceedings void. It must also be remembered that the probate court in this state is a court of record; (Const., art. 3, § 8; Act relating to Probate Courts, § 1;) and while it has jurisdiction only of particular classes of things, such as the care of the estates of deceased persons, minors, and persons of unsound mind, yet it has general jurisdiction of these things. (See constitution and statute above cited, and also acts relating to executors and administrators, guardians and wards, and lunatics and habitual drunkards.)

7. Irregularities  
—sale and  
deed deemed  
valid.

Hence all presumptions should be in favor of the regularity of all the proceedings of probate courts within their jurisdiction of the aforesaid particular classes of things, and such proceedings should seldom be held to be void when attacked collaterally, as in this case; never, indeed, except where it is shown affirmatively that the court had no jurisdiction.

The judgment of the court below will be affirmed.

All the Justices concurring.

---

Riggs v. Anderson.

---

## S. B. RIGGS v. MONTFORD ANDERSON.

**TOWN-SITE CERTIFICATES—Tax Deeds—Paramount Title.** In an action for the recovery of real estate, where the plaintiff claimed title under a certificate issued by a town-site company, duly assigned, showing that the holder was entitled to a good and sufficient warranty deed, as soon as such company should receive the title to the town-site, and such town-site company obtained the title through the probate judge, but never made a deed to the assignee of such certificate, and the corporation expired by limitation, and the defendant claimed under tax deeds, which were void; and the fact was that he had been in possession of the premises and made lasting and valuable improvements thereon, more than one year before suit was brought: *Held*, That the plaintiff's title was paramount to that of the defendant, and that he was entitled to recover as the equitable owner of such real estate.

*Error from Butler District Court.*

**EJECTMENT.** Judgment for defendant, *Anderson*, at the December term, 1888. The plaintiff, *Riggs*, brings the case to this court. The facts are stated in the opinion.

*J. Jay Buck*, for plaintiff in error.

*Eaton, Love & Pollock*, for defendant in error.

Opinion by GREEN, C.: This was an action for the recovery of lot 4 in block 77, in Arkansas City, commenced in the district court of Cowley county, but tried on a change of venue in Butler county. The plaintiff below claimed title under the following state of facts: The lot in question was a part of the town-site of Arkansas City, which was entered by the probate judge of Cowley county, on the 15th day of July, 1871, and deeded by him to the Arkansas City Town Company, on the 2d day of October, 1871. A patent was issued May 1, 1873. The Arkansas City Town Company was chartered July 13, 1871, and the term of existence was fixed at the period of 10 years. Jacob Stotler was a member of the town company and a stockholder. As such stockholder, he received

## Opinion of the Court.

two certificates from the town company, which were the same, except as to the number, one of which reads as follows:

"No. 270.—ARKANSAS CITY TOWN COMPANY.—This certificate of stock entitles the holder, Jacob Stotler, to one share of seven lots in Arkansas City, Cowley county, Kansas, and to receive a good and sufficient warranty deed for the several lots as soon as the company shall receive title to the town-site and shares shall be drawn.

H. B. NORTON, *President*.

W. M. SLEETH, *Secretary*.

"ARKANSAS CITY, Sept. 6, 1871."

Previous to the drawing, Jacob Stotler sold and assigned his interest in the certificate to Solomon H. Dodge, and made the following indorsement thereon:

"For value received, I hereby transfer and assign the within certificate to Solomon H. Dodge.

(Signed) JACOB STOTLER."

This assignment was recognized by the town company; and, on the 28th day of October, 1871, Dodge was notified by its secretary of the drawing, and that certificate numbered 270 had drawn lot 4, in block 77, with others. Some time in the year 1883, Dodge delivered his certificates to the plaintiff in this action, with a request to procure a deed for the lots drawn; and in February, 1883, the plaintiff applied to the secretary of the town company for such deed, but failed to obtain it, for the reason that the secretary regarded the corporation as extinct by the limitation in its charter. Solomon H. Dodge died on the 23d day of May, 1886, leaving two heirs, who conveyed by quitclaim deed to the plaintiff all their interest in the lots drawn by both certificates. A complete record was made of the drawing, but opposite the lots drawn by the certificates issued originally to Stotler and assigned to Dodge no name was written to indicate the person entitled to the deed for such lot. H. B. Norton was the only president of the Arkansas City Town Company, and he removed to California in 1874 or 1875, and died there in 1884.

The defendant below claimed title by possession acquired on the 10th day of March, 1885, first, under a tax deed, dated



---

Riggs v. Anderson.

---

May 15, 1876, to F. Gallotti; second, by a sheriff's deed, dated June 3, 1879, based upon the foreclosure proceedings of a mortgage given by Gallotti to F. J. Chapel; third, by virtue of a tax deed executed to C. M. Scott, September 14, 1883, and recorded September 22 following, holding title by intermediate conveyance from the grantees. The defendant, with those under whom he claims, paid all of the taxes upon the lot in controversy, except the taxes embraced in the two deeds. The defendant entered into possession of the lot on the 10th day of March, 1885, and has ever since been in the actual and exclusive possession, and has made lasting and valuable improvements upon the same, which were completed more than one year before this action was brought. Previous to March 10, 1885, the lot in question was vacant and unoccupied, and never was in the possession of Stotler or Dodge. The first tax deed under which the defendant below claimed was void on its face; and it was established that the second tax deed was made by the county clerk in express violation of the order of the board of county commissioners. The taxes had been previously paid, and the board had declared the sale invalid, and ordered the clerk not to convey the same, and the county treasurer was authorized to refund the taxes and penalties paid. The court below found for the defendant, and quieted the title in him. The plaintiff in error claims that, under the facts as found by the district court, he had a perfect equitable title to the lot in question, and brings the case here upon the findings of the court, and asks a reversal of the judgment. The tax deeds under which the defendant claimed title were void; the first deed, because the lots included therein were not contiguous or adjacent and were all sold and deeded together. The second deed was void for two reasons: First, the taxes for which the lot had been sold had been paid; second, the clerk had been ordered not to make a deed on account of the erroneous sale, and it was voidable because the final notice was defective; hence, the defendant was an occupant under two void tax deeds.

Do the findings of the court establish such an equitable ti-

## Opinion of the Court.

tle in the plaintiff in error as authorized a recovery of the lot in question? The legal title to the lot was in the Arkansas City Town Company; it had issued certificates which had been duly assigned by the holder to Dodge and by Dodge's heirs the interest in such certificates had been quitclaimed to the plaintiff in error. The only thing lacking was a conveyance from the town company to the plaintiff in error, to make his title complete. Before he procured a deed, the corporation had expired. The certificate recited that the original holder was entitled to a sufficient warranty deed for the several lots as soon as the company received a title to the town-site and the shares should be drawn. From the findings, it appears that the town company obtained the title; and that fact established the right of the holder of the certificate to a deed. The assignment of the certificate to Dodge, and the quitclaim deed of his interest, by his heirs, made the plaintiff in error the equitable owner of the lot. While it is true and a well-settled legal proposition that a plaintiff in an action in ejectment must recover upon the strength of his own title, yet, in this state, under § 595 of the code of civil procedure, the plaintiff is not required to hold the legal title, or a title paramount to the title of all others, to enable him to recover. All that is necessary to entitle him to recover is, that he shall have some kind of an estate in the property in controversy, legal or equitable, and that his title to the property shall be paramount to that of the defendant. (*Hollenbeck v. Ess*, 31 Kas. 87; *A. T. & S. F. Rld. Co. v. Pracht*, 30 id. 71; *A. T. & S. F. Rld. Co. v. Rockwood*, 25 id. 302; *Simpson v. Boring*, 16 id. 248, and cases there cited.)

We think the title of the plaintiff, as found by the trial court, was superior to that of the defendant.

The court found that the first tax deed was void on its face, but as to the second, while good on its face, as a matter of fact the taxes had been paid prior to the sale; this rendered the second deed void. Where the owner of land or his agent redeemed the same from a tax sale before the execution of the tax deed, in accordance with the provisions of the statute, a

---

Cook v. Larson.

---

tax deed issued after the land is so redeemed is null and void. (Tax Law, § 140; Gen. Stat. of 1889, ¶ 6994; *Leitzbach v. Jackman*, 28 Kas. 524.) As we view the case, the defendant only had a possessory title. While possession, with claim of ownership, is evidence of title, it is of itself an inferior title. The legal title to the town-site passed from the government to the probate judge, and from him to the town company; and the latter had issued a certificate by which it parted with all its interest in the lot in question, except conveying the legal title, which it held for the benefit of the certificate holder, his heirs or assigns. It will be presumed that the probate judge deeded the land to the proper party. (*Sherry v. Sampson*, 11 Kas. 612.) The defendant can be amply protected for the improvements he has made upon the premises and the taxes he has paid. (Tax Law, § 142; Gen. Stat. of 1889, ¶ 6996; Civil Code, §§ 601, 602.)

We recommend a reversal of the judgment of the district court, and that a new trial be granted.

By the Court: It is so ordered.

All the Justices concurring.

---

### HIRAM COOK *et al.* v. JAMES LARSON.

1. CONTINUANCE *before Justices of the Peace.* Paragraph 4931 of the General Statutes of 1889 secures to either party to a cause the right to a continuance for any number of days not exceeding 15, upon filing with the justice the affidavit required thereby.
2. NEW TRIAL—*No Motion—Review.* Where, in a justice's court, an application for a continuance has been made, and refused by the court, the alleged error growing out of such refusal may be reviewed in this court without any motion for a new trial.

### *Error from Wilson District Court.*

COOK and others bring here for review the refusal of the court below to grant them a continuance. The facts appear in the opinion.

*C. S. Reed*, for plaintiffs in error.

*Geo. P. Uhl*, for defendant in error.

Opinion by STRANG, C.: This action was begun before a justice of the peace by James Larson against Hiram Cook, R. S. White, J. C. Vassar, and C. G. Glenn. Service was never had on Vassar. On the return-day of the summons the other defendants appeared and made a motion for a continuance, which was supported by an affidavit alleging that they could not safely proceed to trial at that time for want of material testimony which they had been unable to procure. They asked for a continuance for 15 days. The court refused to grant them a continuance for 15 days, and set the cause for trial in 10 days, over the objection and exception of the defendants. On the day to which the case had been continued the defendants did not appear, and the court rendered judgment against them for the amount of the plaintiff's claim. Within 10 days thereafter the defendants prepared, and the court allowed and signed, a bill of exceptions, and the case was taken to the district court on a petition in error, in which it was alleged that the court had committed error in refusing the defendants a continuance for 15 days. The district court held that the justice had committed no error, and remanded the case to his court for execution of the judgment. The plaintiffs in error were not satisfied with the judgment of the district court, and bring the case here, still insisting that they were entitled to a continuance for 15 days on their application in the justice's court, and that it was error for that court to refuse them such continuance; and also, that the district court erred in refusing to reverse the justice for such error; and this is the only assignment of error in this court.

The defendant in error raises some preliminary questions, to which our attention is directed in his brief. It is admitted that there was no motion for a new trial in the justice's court, and it is asserted that, because there was not, no review of the

error assigned can be had in this court. The error complained of did not arise on the trial of the cause. It occurred 10 days before the trial of the case was begun, and was not, therefore, error of law occurring on the trial of the cause. The decisions of this court which hold that rulings of the lower court, made in the course of a trial, are not available as grounds of error in this court unless the lower court has had an opportunity to reexamine and correct them upon a motion for a new trial, are not, therefore, applicable to this case. The application for the continuance, and the affidavit in support thereof, became a part of the record in the justice's court, and when brought up to the district court and to this court by the bill of exceptions, the alleged error complained of is apparent upon the record, and needs no motion for new trial to bring it to the attention of the court. Among other things, ¶ 4641, General Statutes of 1889, says: "The supreme court may reverse, vacate or modify a judgment of the district court, for errors appearing on the record." In this case the alleged error appears on the record, and the above is sufficient authority for reviewing and correcting it here. (See, also, the case of *Earlywine v. T. S. & W. Rld. Co.*, 43 Kas. 746.)

The defendant contends that the refusal to grant a continuance cannot be reviewed here, because the bill of exceptions allowed and signed by the justice was not allowed and signed in time; that the ruling of the court refusing the continuance complained of was on the 10th day of the month, and the bill of exceptions was not signed until the 29th. The defendant seems to think the bill must be allowed and signed within 10 days from the date of the ruling complained of. But the statute says: "The bill of exceptions may be signed and sealed at any time within 10 days from the day on which judgment is given in the action." The judgment was rendered on the 20th day of the month, and the bill was allowed and signed on the 29th, and was therefore within time. Were the defendants in the justice's court entitled to a continuance on the application made there as a matter of right? We think

they were. Paragraph 4931, General Statutes of 1889, reads as follows:

"Either party may have the trial adjourned without the consent of the other, for a period not exceeding 15 days, by filing an affidavit of himself, his agent or attorney, that he cannot, for want of material testimony which he has been unable to procure, safely proceed to trial."

The defendants filed the affidavit provided for by the above section, and demanded a continuance for 15 days. We think the statute gives either party filing the affidavit the absolute right to a continuance for any number of days not exceeding 15. It vests no discretion in the court. It is mandatory. (*West v. Rice*, 4 Kas. 563.)

If the defendants were entitled to a continuance for 15 days, then the refusal of the court to allow it was error; and if such refusal was error on the part of the justice's court, then, when the matter was taken to the district court by petition in error, it was error for said court to overrule the petition in error. It is therefore recommended that the judgment of the district court be reversed, and the case sent back for new trial.

By the Court: It is so ordered.

All the Justices concurring.

47	73
47	759

### THOMAS DURHAM V. T. J. HADLEY.

1. **CONTRACT—Sale of Land—Title—Implied Warranty.** In every contract for the sale of land there is always an implied warranty by the vendor that he has good title, unless such warranty be expressly excluded by the terms of the contract. The implied warranty exists so long as the contract remains executory, *i. e.*, until the deed is given.
2. **CASE, Followed.** The case of *O'Neill v. Douthitt*, 40 Kas. 689, followed.
3. **TITLE, Clouded—Purchaser, When not Compelled to Pay.** Where a purchaser enters into a written agreement with the alleged owner of

---

Durham v. Hadley.

---

certain land to purchase the same upon installments, and the purchaser afterward discovers that the title is clouded upon the records by an apparent incumbrance in such a manner as to affect the value of the property, and to interfere with the sale of the land to a reasonable purchaser, such a purchaser is not compelled to complete the payments upon his contract and trust to future litigation to clear or quiet the title.

*Error from Johnson District Court.*

On the 14th day of February, 1888, *T. J. Hadley* and *C. M. McEntire* brought their action against *Thomas L. Hogue*, *S. R. Burch* and *H. S. Miller*, to recover \$500 alleged to have been received by *Hogue, Burch & Miller* as the agents of *Mrs. Bowen* for certain real estate sold by them for her benefit. At the instance of *Hogue, Burch & Miller*, *Thomas Durham* was also made a defendant. With the consent of the court, he filed an answer, claiming the \$500. Trial before the court without a jury, at the August term, 1888, and the court made and found the following special findings of fact:

"1. On the 1st day of June, 1860, *Charles H. Thompson* received a patent from the United States for the southeast quarter of section 25, township 13, range 23, in the district of lands subject to sale at *Lecompton, Kansas*, which patent was duly recorded in the office of register of deeds in *Johnson county, Kansas*, April 12, 1873, and said *Thompson* became and was the absolute owner of said premises.

"2. The said *Charles H. Thompson*, on the 3d day of March, 1859, duly conveyed said land by warranty deed to *Simeon F. Hill*. Said deed was duly recorded May 17, 1859.

"3. Said *Simeon F. Hill* and *Mildred A. Hill*, his wife, on the 1st day of May, 1860, executed a mortgage on said land to *Wyllys King et al.* to secure the sum of \$1,143.30, due six months after date, which mortgage was duly recorded May 21, 1860, and has been duly released of record.

"4. On the 11th day of May, 1859, said *Simeon F. Hill* and wife, *Mildred A. Hill*, executed a mortgage on said land to said *Charles H. Thompson*, to secure \$834, payable February 10, 1860, which was duly recorded in the office of the register of deeds of *Johnson county, Kansas*, May 23, 1859.

"5. No assignment of said mortgage appears of record, and no release appears on the margin thereof, and the only release

## Statement of the Case.

of record of said mortgage executed by said Simeon F. Hill and wife to said Thompson, in evidence or of record, is the following instrument, recorded May 30, 1862, in the recorder's office of Johnson county, Kansas:

"KNOW ALL MEN BY THESE PRESENTS, That we, Benjamin M. Jewett and Matilda Jewett, his wife, for and in consideration of \$800, to them in hand paid by S. F. Hill, of Olathe, Kas., have granted, bargained, sold, released and forever quitclaimed unto the said S. F. Hill all the right, title, claim and demand whatever, which we have, or may have acquired, in and to a certain piece of land by reason of a certain mortgage executed by said Hill to Charles H. Thompson, which said land is described as follows, to wit: Southeast quarter section twenty-five (25), in township thirteen (13), of range twenty-three (23).

"IN WITNESS WHEREOF, We have hereunto set our hands and seals, this 28th day of May, 1862. (Signed) BENJAMIN M. JEWETT.

MATILDA JEWETT.

"STATE OF MISSOURI, COUNTY OF JACKSON, ss.

"On this 28th day of May, 1862, before me, the undersigned, clerk of the Kansas City court of common pleas, within said county and state, personally appeared Benjamin M. Jewett and Matilda Jewett, his wife, to me personally known to be the persons who executed the foregoing conveyance, and acknowledged that they executed the same for the purposes therein mentioned; and the said Matilda Jewett, being by me made acquainted with the contents of the foregoing, and, on examination separate and apart from her said husband, acknowledged that she executed the same and relinquished her dower therein mentioned freely, and without compulsion or undue influence of her said husband.

"IN WITNESS WHEREOF, I hereto set my hand and affix the seal of said court, at office in Kansas City, Mo., this 28th day of May, 1862.

[SEAL.]

E. M. SLOAM, Clerk,

By C. W. SLOAM, Dep. Clerk.'

"6. Said Simeon F. Hill died intestate in Johnson county, Kansas, on the 9th day of January, 1863, leaving Mildred A. Hill, his widow, and Lizzie Hill, aged 11 years, and Alice Hill, aged 8 years, his sole and only heirs.

"7. Said Lizzie Hill afterward intermarried with T. J. Hadley, one of the plaintiffs herein, in the year 1871; and the said Alice afterward intermarried with John V. Haverty, in the year 1875; and the said Mildred A. Hill, after the death of her husband, Simeon F. Hill, intermarried with one Addison Bowen, in the year 1864.

"8. In the year 1867, M. A. Bowen commenced a civil action in the district court of Johnson county, Kansas, against Lizzie Hill and Alice Hill, to partition the land in said patent described, as well as other land of which Simeon F. Hill was owner at the time of his death, which proceedings in partition are in evidence herein; and defendants Lizzie Hill and Alice Hill were duly represented in court by guardian *ad litem*, William Roy, Esq., appointed by the court, an attorney at law of this bar. In said partition suit three commissioners



---

Durham v. Hadley.

---

were appointed by the court to make partition of said lands, and made their return, setting apart to M. A. Bowen the land in controversy, with other land, and which said report was submitted to said court and spread upon the records thereof on the 26th day of October, 1867, the same being the twelfth day of the October term of said court, and an order was thereupon made by said court, in the words and figures following:

"It is hereby considered and ordered by the court, that the said proceedings and report be and the same are hereby approved and confirmed, and that said parties hold the parts and premises as set off and assigned to each, respectively."

"No other order for the partition of said lands, and no order of confirmation of said proceedings or judgment, or decree in partition, was made in said cause, except as above set forth.

"9. The said M. A. Bowen had been in the actual, peaceable adverse possession of the land in controversy for more than 15 years before the sale thereof to Thomas Durham.

"10. On the 30th day of March, 1887, Hogue, Burch & Miller were the agents of M. A. Bowen to sell the land in controversy; and on that day, they, as such agents, entered into the following written contract with said Thomas Durham:

"ARTICLES OF AGREEMENT, Made this 30th day of March, 1887, between Mrs. M. A. Bowen and Addison Bowen, her husband, parties of the first part, and Thomas Durham, party of the second part, witnesseth: That the said party of the second part shall first make the payments and perform the covenants hereinafter mentioned in this instrument, the said party of the first part will convey and assure to the party of the second part in fee-simple, clear of all encumbrances whatsoever, by a good and sufficient warranty deed, the following lot, piece or parcel of ground, viz.: 32 acres, more or less, in the southeast of the southeast quarter, and a fraction in the southwest quarter of the southeast, all in section 25, township 13, of range 23; and the said party of the second part hereby covenants and agrees to pay to said party of the first part the sum of \$200 per acre, in the manner following: \$500 cash in hand paid, the receipt of which is hereby acknowledged, and the sum of one-half of the whole amount in 29 days from the above date, and the balance in one year from date, at 8 per cent. interest per annum; (the above land is sold subject to a lease made to M. T. Graham, which covers nine acres of grass land;) with interest at 8 per cent. per annum, payable annually, on the whole sum remaining from time to time unpaid, and to pay all taxes, assessments or impositions that may be legally levied or assessed upon said land subsequent to the year 1886; and in case of the failure of the said party of the second part to make either the payments or perform any of the covenants on his part hereby made and entered into, this contract shall, at the option of the party of the first part, be forfeited and determined, and the party of the second part shall forfeit all payments made by him on this contract, and such payment shall be retained by said party

## Statement of the Case.

of the first part in full satisfaction and in liquidation of all damages by her sustained, and she shall have the right to reënter and take possession of the premises aforesaid. It is mutually agreed that all the covenants and agreements herein contained shall extend to and be obligatory for the heirs, executors, administrators and assigns of the respective parties.

"IN WITNESS WHEREOF, The parties to these presents have hereunto set their hands, the day and year first above written.

(Signed)

MRS. M. A. BOWEN,

ADDISON BOWEN,

Per Hogue, Burch & Co., Agents.

THOMAS DURHAM.'

"11. Said written contract was the only contract between said Thomas Durham and the said Bowens for the sale of said land.

"12. Said Bowen executed a warranty deed to said land to said Thomas Durham, who was a non-resident of the state of Kansas, and said deed was delivered to Hogue, Burch & Co. for said Durham, and said Hogue notified Thomas F. Durham, agent of Thomas Durham, of such tender and demanded the purchase-money, in accordance with the terms of the written contract. Said Durham objected to the title of said land, and refused to accept said deed and make payment of said purchase-money.

"13. In November, 1887, the said Thomas Durham, in Philadelphia, Pa., made to said Thomas F. Durham, in Kansas City, Mo., a quitclaim deed to said land in controversy.

"14. The day before the commencement of this suit, the said M. A. Bowen in writing assigned to her son-in-law, T. J. Hadley, and C. M. McEntire, plaintiffs herein, the sum of money so due to her from her agents, Hogue, Burch & Co., and the consideration for such assignment was services rendered for her and work done.

"15. No deed was tendered to Thomas Durham, or Thomas F. Durham, who lived in Missouri, but said Durhams were notified that said deed had been tendered to Hogue, Burch & Co., for them.

"16. An abstract was furnished to said Thomas Durham by T. J. Hadley; by the terms of the contract, the Bowens were not bound to furnish such abstract.

"17. At the date of the execution of said contract, the said Thomas Durham paid to Hogue, Burch & Co. \$400 cash, and gave to Hogue, Burch & Co. his due-bill for \$100, having only \$400 in his possession at the time; and said Hogue, Burch & Co. never paid said Bowens said money, or any part thereof, but still retain the same.

---

Durham v. Hadley.

---

"18. The said Bowens have complied with all the conditions on their part under said contract, and a complete title to said land in controversy is vested in said M. A. Bowen, free and clear of encumbrances."

And thereon, as a conclusion of law, the court found that T. J. Hadley and C. M. McEntire were entitled to recover from Hogue, Burch & Co. the \$400 in money and the \$100 due-bill, as prayed for in their petition. Judgment was entered accordingly, and the costs were adjudged against Thomas Durham. He excepted, and brings the case here.

*I. O. Pickering*, for plaintiff in error.

*John T. Little*, and *James P. Hindman*, for defendants in error.

The opinion of the court was delivered by

HORTON, C. J.: This action was brought by T. J. Hadley and C. M. McEntire, as assignees of Mrs. M. A. Bowen, to recover the sum of \$500, alleged to have been deposited with Hogue, Burch & Miller, real-estate agents, by Thomas Durham, as part purchase-money for certain real estate alleged to have been purchased by Durham from Mrs. M. A. Bowen, through Hogue, Burch & Miller, as her agents. Afterward, by order of the court, Thomas Durham was made a party defendant, and filed his answer claiming the money. Hogue, Burch & Miller answered, admitting the payment of the money to them as agents of Mrs. Bowen, disclaiming all right thereto, and brought it into court to be paid to the party entitled thereto.

Trial was had by the court, without a jury, and, at the request of Durham, the court made special findings of fact and conclusions of law. Judgment was afterward rendered in favor of Hadley and McEntire, and against Hogue, Burch & Miller for the recovery of the money, and against Durham for the costs of suit. Durham excepted, and brings the case here.

It appears from the record that \$400 in cash and a note of \$100 were deposited, on March 30, 1887, by Thomas Durham

## Opinion of the Court.

with Hogue, Burch & Miller, agents of Mrs. M. A. Bowen, on a contract for the sale of land, which contract was never consummated. On February 13, 1888, the day before this action was brought, Mrs. M. A. Bowen assigned her claim to the \$500, in writing, to Hadley and McEntire. After the written contract of the 30th of March, 1887, the evidence shows that Mrs. M. A. Bowen remained in possession of the land. After the contract was delivered, T. J. Hadley, the son-in-law of Mrs. M. A. Bowen, furnished an abstract of title of the land to Thomas F. Durham, the agent of Thomas Durham. As soon as the abstract was furnished and examined, Durham objected to the title, and paid nothing further upon the contract. Mrs. Bowen deposited a deed of the land with Hogue, Burch & Miller, and then demanded the money stipulated in the contract, and, when it was not paid over, she claimed the \$500 as a forfeit or penalty. In 1860, Charles H. Thompson was the owner of the land by a patent from the government. On the 3d of March, 1859, he conveyed the land by warranty deed to Simeon F. Hill. On the 11th day of May, 1859, Simeon F. Hill and wife executed a mortgage on the land to Charles H. Thompson to secure \$834, payable February 10, 1860. This mortgage was duly recorded in the office of the register of deeds of Johnson county on May 23, 1859. No assignment of the mortgage appears of record, and no release thereof appears on the margin of the record. On May 30, 1862, Benjamin M. Jewett and Matilda Jewett filed a release and quitclaim deed, reciting that Simeon F. Hill had paid to them the mortgage executed to Thompson. It was decided in *O'Neill v. Douthitt*, 40 Kas. 689, that—

“Where an abstract of title shows that a mortgage on the land has been recorded, it is then necessary, in order that the abstract shall show a good and complete title, that it shall also show that the mortgage was not only released and discharged of record, but also that the person releasing or discharging the same had full and complete authority of record to do so.”

1. Title, clouded  
— purchaser,  
when not com-  
pelled to pay.

---

Durham v. Hadley.

---

There is nothing in the office of the register of deeds of Johnson county showing, or tending to show, that Benjamin F. Jewett and wife had any authority to release or discharge this mortgage. The title of the property described in the contract executed by Mrs. Bowen and Thomas Durham was clouded or affected by the real-estate mortgage when the contract was executed, and the cloud had not been removed when Mrs. Bowen tendered her deed. It is said in *O'Neill v. Douthitt*, *supra*, that—

“The general policy of the law in this state is to require, as far as practicable, every interest in real estate to be evidenced, not only by writing, but also by some public record of the county in which the real estate is situated. (See statutes of frauds and perjuries, §§ 5 and 6; statutes relating to trusts and powers, § 1; registry laws; acts relating to conveyances, to mortgages, to the records of courts, to mechanics' liens, to other liens, and to taxes.) Under our statutes and in law, as contradistinguished from equity, everything affecting real estate must be in writing, (see statutes above cited,) and every instrument in writing affecting real estate may be recorded, (conveyance act, § 19,) and, to be considered as valid as against persons without actual notice, it must be recorded. (Conveyance Act, § 21.) Now the release or discharge of a real-estate mortgage certainly affects real estate, or, to speak more accurately, it affects the title thereto or some interest therein. Hence, a valid release of a real-estate mortgage should not only be shown by a valid writing, but it should also be shown by a valid record. Such has always been the view taken by this court. (*Burhans v. Hutcheson*, 25 Kas. 625; *Lewis v. Kirk*, 28 id. 497; *Perkins v. Matteson*, 40 id. 165; same case, 19 Pac. Rep. 633.)”

The question therefore arises, whether, upon the conclusions of fact, Thomas Durham was compelled to perform his contract of the 30th of March, 1887, and, if he did not do so, whether the \$500 deposited by him can be treated as a forfeit or penalty. The trial court found that Mrs. Bowen had fully complied with all of the conditions of the contract upon her part, and that she was the owner of the land in controversy, free and clear of all incumbrances. But, notwithstanding this fact, it appears from the records that the title to the land is doubt-

## Opinion of the Court.

ful, or at least clouded, on account of the non-release upon record of the mortgage of \$834, with interest. Mrs. Bowen agreed in her written contract that she would "convey and assure to Thomas Durham the 32 acres of land described therein in fee-simple, clear of all incumbrances whatsoever, by a good and sufficient warranty deed." Under the contract, Durham was entitled, as the purchaser of the land, not only to a good title, but to a marketable title. In every contract for the sale

of land there is always an implied warranty by the vendor that he has good title, unless such warranty be expressly excluded by the terms of the contract. The implied warranty exists so long as the contract remains executory, *i. e.*, until the deed is given, when the party must rely on the covenants in the deed, unless there has been fraud, in which case relief may be afforded in equity.

It is undoubtedly true that, where an incumbrance is discovered upon land, the vendor must discharge it before he or she can compel the payment of the purchase-money by the vendee at law or in equity. In this case, it is claimed that no incumbrance existed, because the mortgage had been paid; but the records in the office of the register of deeds show no release and no payment to any party having authority to release or accept payment. If Mrs. Bowen had commenced an action for specific performance of the contract against Durham, she could not have succeeded, because it is the rule that, in actions by a vendor, the parties will not be forced to complete the contract unless the title is free from any reasonable doubt. Again, a specific performance will never be decreed at the action of the vendor, whenever the doubt concerning his title is one which can only be settled by further litigation. A vendee "will not be compelled to buy a lawsuit." (Pom. Contr. §§ 198-208.)

In this case, under the decision of this court in *O'Neill v. Douthitt*, although Mrs. Bowen may have had title to the land free from any incumbrance, neither the abstract of title nor the county records so showed, and as Durham not only wanted a good title, but a good, marketable title, one which appeared

---

Durham v. Hadley.

---

from the records of the county to be good and free from all incumbrances, he could not be compelled to accept the deed of which he had notice, or be compelled to pay the money upon the contract, and then permit Mrs. Bowen to settle her title by litigation in the future, or be compelled to quiet his title by future litigation. Mrs. Bowen ought, before she made her contract, or offered her deed, or at least before this action was brought, to have had Charles H. Thompson release on the record the mortgage of \$834 and all interest, if it is paid, or she ought to have had the written assignment of the mortgage to Benj. F. Jewett recorded, if Jewett was ever the legal owner thereof. She did none of these things, and none of these things have yet been done. The title is clouded with an apparent incumbrance, and the land, whether bought by Durham for speculation or for other purposes, is in no condition to be sold, as the seeming incumbrance, not legally released, must affect the value thereof, and interfere with the sale of the land to a reasonable purchaser. It is said, however, that Mrs. Bowen never agreed to furnish any abstract, and therefore that this case differs from the O'Neill-Douthitt case. It is immaterial whether there was any agreement to furnish an abstract or not. The cost of the abstract is not in controversy. The abstract was furnished, and whether Durham ascertained from the abstract, or from the records in the office of the register of deeds, that the title of the land was clouded by an apparent incumbrance, is of no concern. The facts are, that Durham could not and cannot obtain a good marketable title. He cannot be compelled to accept any other title. The quitclaim deed of Durham of the 15th of November, 1887, is of no importance. If he had no title or interest in the land, the quitclaim deed transferred nothing.

Upon the facts, we do not think that the money deposited with Hogue, Burch & Miller can be claimed as a forfeit or penalty; therefore the judgment must be reversed, and the cause remanded, with direction to the trial court to enter judgment upon the findings of fact in favor of Thomas Durham, and against Hadley and McEntire, the plaintiffs below.

All the Justices concurring.

## OCTAVE GAGNON V. N. B. BROWN &amp; Co.

**CHATTEL MORTGAGE—Lien—Priority.** Where a mortgagee obtains possession of the mortgaged chattels before any lien or other right attaches, his title under the mortgage is good against everybody, if it was previously valid between the original parties to the mortgage. The purchaser of a note secured by a subsequent mortgage upon the same property, taken by the mortgagee with notice of the prior mortgage, is bound to take notice of the possession of the first mortgagee, acquired previous to such purchase.

*Error from Cloud District Court.*

**REPLEVIN.** Judgment for plaintiffs, *N. B. Brown & Co.*, at the October term, 1888. The defendant, *Gagnon*, brings the case here. The facts are sufficiently set forth in the opinion.

*Theodore Laing*, and *J. J. McFarlin*, for plaintiff in error.

*A. H. Ellis*, *W. W. Caldwell*, and *F. T. Burnham*, for defendants in error.

Opinion by GREEN, C.: On the 30th day of November, 1885, August Berthiaume executed and delivered to Octave Gagnon a chattel mortgage on a bay mare named "Fan," and a bay horse called "Tom," to secure the payment of the sum of \$150 in one year from date. About the 9th day of November, 1886, Berthiaume executed and delivered to C. L'Ecuier another mortgage upon the same property, to secure the payment of a note for \$200, due on the 1st day of December, 1886; this mortgage was taken by Alcide L'Ecuier, as agent and attorney for the mortgagee; and it is claimed by the plaintiff in error that the former knew that Gagnon had a mortgage upon this property. This mortgage was filed in the office of the register of deeds of Cloud county, on the 16th day of November, 1886. On the 29th day of November, 1886, the plaintiff in error took possession of both horses, under the mortgage, and on the same day filed his mortgage for record in the same county. On the 1st day of December, 1886, *N. B. Brown &*

47	83
49	747
47	83
57	357
47	83
72	228



---

Gagnon v. Brown.

---

Co. purchased the note and mortgage executed to L'Ecuyer and demanded possession of the horses of Gagnon, which was refused. This action was brought on the 11th day of December, 1886, in the district court of Cloud county, by the defendants in error, to recover the property described in the mortgage executed to L'Ecuyer. The plaintiff in error offered to show that his mortgage was filed for record on the 29th day of November, 1886; the defendants in error objected, for the reason that the filing was of a date subsequent to the filing of the mortgage of the defendants in error. This objection was sustained. The court instructed the jury to return a verdict for the plaintiff below, and overruled the defendant's motion for a new trial.

The plaintiff in error contends that L'Ecuyer had actual notice of the Gagnon mortgage and took subject to it; that Brown & Co. got no better right by the assignment than they could have obtained had they taken a mortgage directly to themselves, on the day the assignment was made to them; that on that day Gagnon had actual, open and adverse possession of the property, under his mortgage, having taken it on the 29th day of November, 1886, and also had his mortgage on file at that date. The mortgagor, Berthiaume, left Cloud county about the 16th day of November, 1886. Prior to his departure he delivered the horses in question to Alcide L'Ecuyer, who was agent of the mortgagee, C. L'Ecuyer, and it seems he delivered the property to Sifroy Berthiaume, who retained the horses until the 29th day of November, 1886, when they were taken from him without his consent, by Gagnon. There seems to have been some question as to the open possession of the property by the latter until the suit was commenced. It is claimed that the horses were kept out of sight a portion of the time, and there is some evidence to support this claim. It is argued by the plaintiff in error that L'Ecuyer acquired no adverse interest in the mortgaged property because of actual notice; that Brown & Co. had no specific interest in or lien upon the property prior to the time Gagnon filed his mortgage and took possession; therefore, Brown & Co. acquired no

## Opinion of the Court.

superior equity through L'Ecuyer, because there was none to give. They had no such equity in their own right, because they bought with notice offered by adverse possession and prior record. It is conceded by counsel for defendants in error that if there had been no note connected with the mortgage, or if the note had been non-negotiable, the assignee would have had no better rights than the assignor; but it is urged that the general rule is, that in all cases where a negotiable promissory note secured by a mortgage is indorsed before maturity to a *bóna fide* purchaser for value, the assignee takes the mortgage, as well as the note, free of all preëxisting equities. This rule may be correct, but the question is one of application. It is admitted by the defendants in error that Alcide L'Ecuyer, the agent of the mortgagee, under whom they claim, had sufficient notice of the existence of the mortgage of the plaintiff in error to put him on inquiry. It would not, therefore, be an open question between the original mortgagee and the plaintiff in error, as to who would be entitled to the mortgaged property. Now, before the defendants in error acquired any right to the property mortgaged, the plaintiff in error took possession of the same. It is immaterial whether the mortgagee took possession *in invitum*, or the mortgagor voluntarily put him in possession, if the act be done in pursuance of a condition contained in the mortgage. (Jones, Ch. Mortg., § 164*a*.) The evidence established the fact that this possession was acquired two days before the assignment of the note to the defendants in error. Was not such possession good against the defendants in error? The right of the defendants in error did not attach until after the plaintiff in error had acquired possession. If a mortgagee takes possession of the mortgaged property before any other right or lien attaches, his title under the mortgage is good against everybody, if it was previously valid between the parties. (Jones, Ch. Mortg., § 178; *Dayton v. Savings Bank*, 23 Kas. 422; *Cameron v. Marvin*, 26 id. 612; *Corbin v. Kincaid*, 33 id. 649; *Dolan v. Van DeMark*, 35 id. 304; *Chipron v. Feikert*, 68 Ill. 284.)

It was said by Chief Justice Campbell, in the case of *Par-*

---

Curtis v. Paggett.

---

*sell v. Thayer*, 39 Mich. 467: "That an immediate and continuous change of possession into the hands of a mortgagee is the best possible notice of his rights against all others." Now, if it be conceded that the original mortgagee, under whom Brown & Co. claim, had notice of Gagnon's mortgage, the mortgagee could not have maintained replevin for the mortgaged property. It is true the mortgage was filed for record on the 16th day of November, 1886, but Brown & Co. acquired no rights to the property until the 1st day of December, 1886, when Gagnon was in possession of the property, so that the claim of Brown & Co. did not attach until the plaintiff in error had acquired possession under his mortgage; and we think, under the authorities cited, the defendants in error were bound to take notice of such possession. For the reasons given, we think the district court erred in its charge to the jury.

It is recommended that the judgment be reversed, and a new trial be granted.

By the Court: It is so ordered.

All the Justices concurring.

---

SEYMOUR F. CURTIS V. ALFRED C. PAGGETT.

TRESPASS ON LANDS—*Injunction, Refused.* When a petition states a cause of action in damages to real estate, and also asks for an injunction to restrain the defendant from trespassing thereon, and the jury find that the defendant had trespassed on plaintiff's land as alleged in the petition, but that he had abandoned his trespasses before suit was begun, and the court refuses to perpetuate the injunction, but renders judgment for the plaintiff for nominal damages and costs, *held*, not error.

*Error from Mitchell District Court.*

THE case is stated in the opinion. Judgment for plaintiff, *Paggett*, on February 4, 1888, for one cent damages, and costs,

---

Opinion of the Court.

---

taxed at \$202.45. The defendant, *Curtis*, brings the case to this court.

*L. J. Crans*, for plaintiff in error.

*A. H. Ellis*, and *F. T. Burnham*, for defendant in error.

Opinion by STRANG, C.: December 12, 1885, Alfred C. Paggett began a suit in the district court of Mitchell county, Kansas, against Seymour F. Curtis. The petition stated a cause of action in damages for injury to real estate, and also asked for an injunction. The plaintiff alleged that he had a well of water upon his land in Mitchell county, Kansas, and that the source whence the supply of water in said well came was also upon his land, a short distance north and west of the well. The defendant owned a farm which cornered with the plaintiff's on the southwest, and it is alleged that the defendant sunk a well on his own land on the northeast corner thereof to the depth of 45 feet; that he then tunneled from the cavity of said well 18 feet in a northwesterly direction, and bored with a well auger in the same direction 54 feet; that the course of the channel made by such tunneling and boring was in the direction of the plaintiff's land and of the source of the supply of water in the plaintiff's well; that said channel was made with the intention of tapping said supply of water on the plaintiff's land, and that it had crossed the line onto the land of the plaintiff, a distance of 25 feet.

The defendant answered, admitting that he owned the farm cornering with the plaintiff's as set out in the petition, and that he had sunk a well, tunneled and bored, upon his said farm for the purpose of obtaining water thereon, but declared that the attempt to thus obtain water had proven a failure, and that he had wholly abandoned it long before the commencement of the suit by the plaintiff. The case was tried by the court, which also submitted certain questions to a jury. The jury found, among other things, that the defendant, in his attempt to secure water, had carried his channel across the

---

Curtis v. Paggett.

---

line onto the land of the plaintiff some 16 feet, and that in so doing he had intended to reach the water on the plaintiff's land which supplied the plaintiff's well, and divert the same from the plaintiff's land and well to his own. But the jury also found that the defendant had abandoned his attempt to thus secure water before suit was begun.

The court entered judgment for the plaintiff for one cent damages, and costs taxed at \$202.45. A motion for new trial was overruled, and the defendant below appeals to this court, and asks that the judgment below be reversed. He contends that the action was solely a proceeding for an injunction, and that, as the jury found the work on his well had been abandoned before the commencement of the action, the plaintiff was not entitled to an injunction, and not being entitled to an injunction he was not entitled to any judgment at all, and the defendant should have had judgment for costs. We do not think this view of the case is tenable. We think the judgment rendered by the court entirely proper under the circumstances of the case. The petition states a cause of action for damages, and also for an injunction. The injunction part of the case failed only because the defendant had abandoned his unlawful attempt to reach and divert the water from the plaintiff's well before the suit was begun. The jury having found that the defendant had abandoned his well and all effort on his part in the direction complained of before the plaintiff asked for an injunction, the court, for that reason, did not perpetuate it. But the injunction allowed was not all there was to the case. The plaintiff claimed that he was damaged in the sum of \$100, and alleged in his petition facts in support of his claim. The jury found that the defendant had bored his channel 16 feet into the land of the plaintiff. This was a trespass upon the plaintiff's land by the defendant, for which he was entitled to nominal damages at least, and that is exactly what the court below gave him. A judgment for nominal damages carries costs. The fact that an injunction was allowed at the commencement of the action added no more costs, practically, than would have

*In re Pinkney, Petitioner.*

accrued without such order. We find no error in the proceedings, and recommend that the judgment of the district court be affirmed.

By the Court: It is so ordered.

All the Justices concurring.

---

*In the matter of the Petition of A. E. PINKNEY et al. for a writ of Habeas Corpus.*

ANTI-TRUST LAW—*Valid Statute.* The provisions of the "anti-trust law," being chapter 257 of the Laws of 1889, so far as they relate to the business of insurance, are covered by the title of the act, and are therefore valid.

*Original Proceeding in Habeas Corpus.*

ON May 12, 1891, a complaint was made charging that the petitioners did, in Leavenworth county, on the same day, "unlawfully agree and combine together and enter into, and then and there were in a contract, agreement and combination with each, and each of them with certain other persons and corporations, the names of which are now unknown to this affiant, which said agreement, contract and combination is and was designed and intended to control the cost and rate of insurance within said state by threatening persons and affiant in the insurance business with injury to their [said persons'] business, if such persons refused to demand the same cost and rate as should be named by said defendants and by them and the other persons and corporations with whom they have combined, in violation of the laws of Kansas." A warrant was issued upon this complaint in similar terms, and the petitioners appeared before the justice issuing the warrant without being arrested, where a preliminary examination was had, at the con-

47	89
50	614
50	620
50	753

47	89
55	376

47	89
57	244
57	273

47	89
64	10
64	516
64	600

47	89
77	469

---

*In re Pinkney, Petitioner.*

---

clusion of which the petitioners were held for appearance and trial at the next term of the district court, and bail was fixed at \$200 each. The petitioners refusing to give a recognizance, a commitment was issued, under which they were taken into the custody of the sheriff, and from this custody they seek release by the writ of *habeas corpus*. Other facts are stated in the opinion of the court, filed on July 9, 1891.

*Thomas P. Fenlon, and E. F. Ware, for petitioners.*

*Lucien Baker, and J. H. Atwood, for respondent.*

The opinion of the court was delivered by

JOHNSTON, J.: The only question presented in behalf of the petitioners is the validity of what is known as the "anti-trust law," so far as it relates to the business of insurance. (Laws of 1889, ch. 257.) The contention is, that the portion of the act pertaining to insurance is not clearly expressed in the title, as required by § 13, article 2, of the constitution, and is therefore void. The title is: "An act to declare unlawful trusts and combinations in restraint of trade and products, and to provide penalties therefor." Section 1 of that act embraces the provision with reference to the business of insurance, and is as follows:

"SECTION 1. That all arrangements, contract, agreements, trusts or combinations between persons or corporations, made with a view or which tend to prevent full and free competition in the importation, transportation or sale of articles imported into this state, or in the product, manufacture or sale of articles of domestic growth or product of domestic raw material, or for the loan or use of money, or to fix attorneys' or doctors' fees, and all arrangements, contracts, agreements, trusts or combinations between persons or corporations designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles, or to control the cost or rate of insurance, or which tend to advance or control the rate of interest for the loan or use of money to the borrower, or any other services, are hereby declared to be against public policy, unlawful, and void."

Section 3 of the act provides as follows:

"SEC. 3. That all persons entering into any such arrangement, contract, agreement, trust, or combination, or who shall, after the passage of this act, attempt to carry out or act under any such arrangement, contract, agreement, trust, or combination described in sections 1 or 2 of this act, either on his own account or as agent or attorney for another, or as an officer, agent or stockholder of any corporation, or as a trustee, committee, or in any capacity whatever, shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than \$100 and not more than \$1,000, and to imprisonment not less than 30 days and not more than six months, or to both such fine and imprisonment, in the discretion of the court."

It thus appears that the body of the act contains a specific provision for the prevention of trusts or combinations which tend to control the cost or rate of insurance, and to punish all persons who enter into or attempt to carry out such trusts or combinations.

The question presented is, does the word "trade," used in the title, fairly indicate and include the provisions of the act with reference to insurance? It is argued that the usual meaning of the word should govern, and in that sense it has reference to the business of selling or exchanging some tangible substance or commodity for money, or the business of dealing by way of sale or exchange in commodities; and it is said that the use of the word in connection with that of "products," in the title, qualifies the meaning of "trade," and makes it all the more apparent that the construction contended for is the correct one. This is the commercial sense of the word, and possibly may be the most common signification which is given to it, but it is not the only one, nor the most comprehensive meaning in which the word is properly used. In the broader sense, it is any occupation or business carried on for subsistence or profit. Anderson's Dictionary of Law gives the following definition: "Generally equivalent to occupation, employment, or business, whether manual or mercantile; any occupation, employment or business carried on for profit, gain,



or livelihood, not in the liberal arts or in the learned professions." In Abbott's Law Dictionary the word is defined as "an occupation, employment or business carried on for gain or profit." Among the definitions given in the Encyclopædic Dictionary is the following: "The business which a person has learnt, and which he carries on for subsistence or profit; occupation; particularly employment, whether manual or mercantile, as distinguished from the liberal arts or the learned professions and agriculture." A like definition of the word is given in the Imperial Dictionary.

Rapalje & Lawrence's Law Dictionary, to which we are cited by the petitioners, gives the restricted definition: "Traffic; commerce; exchange of goods for other goods, or for money." It is the only authority, however, which uses the word in its commercial sense alone. Bouvier limits the meaning to commerce and traffic and the handicraft of mechanics; and we are also cited by the petitioners to the definition given by Webster, which specifically is: "The act or business of exchanging commodities by barter, or by buying and selling for money; commerce; traffic; barter." This author, however, gives the more enlarged meaning of the word as well, as follows: "The business which a person has learned, and which he engages in, for procuring subsistence, or for profit; occupation; especially mechanical employment as distinguished from the liberal arts, the learned professions, and agriculture; as we speak of the trade of a smith, of a carpenter, or mason, but not now of the trade of a farmer, or a lawyer, or a physician." The broader signification given to the word by most of the lexicographers would fairly embrace and cover the provision of the act with reference to the business of insurance. The title prefixed to an act may be broad and general, or it may be narrow and restricted, but in either event it must be a fair index of the provisions of the act; that is, the subject of the act must be clearly expressed by the title. Here a term is employed in the title which, if given the broader meaning, would render the provision in question valid, while, by giving it the narrower and perhaps more common meaning, it would render

## Opinion of the Court.

the provision invalid. Which of these should be adopted? The mere generality of the title to an act does not render it objectionable, so long as the act has but one general object, and the title is such that neither the members of the legislature nor the people to be affected can be misled. Titles of a very general nature have been adopted in the legislation of this state, and their use has been encouraged and sustained. (*Bonman v. Cockrill*, 6 Kas. 311; *Division of Howard Co.*, 15 id. 194; *Woodruff v. Baldwin*, 23 id. 491; *Comm'rs of Marion Co. v. Comm'rs of Harvey Co.*, 26 id. 181; *The State ex rel. v. Sanders*, 41 id. 228.) That the broader meaning of the word "trade" was the one intended by the legislature, is manifest from the incorporation of the insurance provision in the body of the act. The meaning given by the legislature to the terms used for expressing the subject of the act should be considered by the court in determining the sufficiency of the title. While the legislature cannot extend the scope of the title by giving to a word therein a definition which is unnatural and unwarranted by usage, still, if the word admits of the construction given to it by the legislature, and can be properly used in a sense broad enough to include the provisions of the act, the intention of the legislature is entitled to great weight in determining the sufficiency of the title. In *Woodruff v. Baldwin*, 23 Kas. 494, it was said:

"Is it not more just and fair to say that the legislature has used the title in the broadest sense, a sense broad enough to include the subject-matter of this article, and that it meant by the expression 'criminal procedure' every proceeding resulting from crime, and not simply those for the prevention and punishment of crime? . . . The breadth and comprehensiveness of a title is a matter of legislative discretion. . . . The courts cannot modify a title, any more than they can change the body of the law. The title has to be construed even as the language of the act, and the courts may neither narrow nor enlarge the meaning which the legislature intended the title should have. Here is a title intrinsically broad and comprehensive. . . . Evidently the legislature intended by this title one whose scope was broad enough to include the article, and while there is a sense in which the article does not

---

*In re Pinkney, Petitioner.*

---

treat of criminal procedure, yet we must impute to the legislature an intent to use the title in a broader sense."

How can it be said that the business of insurance is foreign to the title of this act, when the subject expressed in the title, taken in its broadest sense, and the one intended by the legislature, would embrace such business? How can anyone be misled as to this provision by the use of the word "trade," when the leading lexicographers and writers employ the word in a sense which is comprehensive enough to cover the provision? The fact that the narrower meaning of the word is the one most frequently used will not justify the court in restricting the meaning which the legislature intended it should have. Suppose the legislature had passed a law entitled "An act to prevent and punish the obstruction of highways," and in the body of the act included specific provisions declaring it to be unlawful to place obstructions upon railroads, as well as upon county roads, streets, and alleys, and prescribed severe penalties for the violation of its provisions: could it be said that the provision with reference to railroads was invalid because it was not indicated by the title to the act? The term "highway," as commonly used, applies to the public roads and streets over which all may travel, on foot, or horseback, or in carriages, and yet in its broader sense it includes railroads; and hence, when by the provisions of the act it appeared that the legislature used it in its broader sense, it could hardly be said that the provision with reference to railroads was unconstitutional because it was not fairly embraced in the title of the act. So here, the legislature having employed the word "trade" in its broadest sense, and one which fairly covers the provision assailed, we do not feel warranted in adopting the narrower meaning or in holding the act invalid. The rigid and technical rule contended for by the petitioners has never been applied to § 16, article 2, of the constitution. Although the provision is mandatory, it has been repeatedly held by this and other courts that a liberal interpretation should be placed upon the construction of language employed in the title to express the subject of the act. In *Bowman v. Cock-*

---

Opinion of the Court.

---

*rill*, supra, the court said that the provision "should be liberally construed; otherwise the legislature would be confined within such narrow rules that they would be greatly embarrassed in the proper and legitimate exercise of their legislative functions." In *City of Eureka v. Davis*, 21 Kas. 580, it was said that "it must be borne in mind that while the constitutional provision is mandatory, it must be applied in a fair and reasonable way; otherwise it would become a source of more injury than the ills it was designed to remedy." In *Philpin v. McCarty*, 24 Kas. 402, it was remarked that "this constitutional requirement is not to be enforced in any narrow or technical spirit. It was introduced to prevent a certain abuse, and it should be construed so as to guard against that abuse, and not to embarrass or obstruct needed legislation." In *City of Wichita v. Burleigh*, 36 Kas. 42, it was said that "a slight inaccuracy in the description of a thing in an act of the legislature, or in the title to the act, will not render the act void, where it may be known both from the act and the title thereto, and the circumstances then existing, what was meant and intended by the legislature." (See, also, *Woodruff v. Baldwin*, supra; *Comm'rs of Marion Co. v. Comm'rs of Harvey Co.*, supra; *The State v. Barrett*, 27 Kas. 213; *Cooley's Const. Lim.*, 6th ed., 175, and cases cited.)

Another rule recognized and followed by all courts in determining the validity of legislative enactments is, that they will not be declared void if they can be upheld upon any reasonable grounds. If their invalidity is a matter of any reasonable doubt, the doubt must be resolved in favor of the act. (*Comm'rs of Cherokee Co. v. The State*, 36 Kas. 337.) Guided by these rules, we reach the conclusion, not without some doubt, however, that the provision of the act with reference to insurance is not foreign to the title of the act, nor violative of § 16, article 2, of the constitution. We do not desire or intend to determine at this time the validity of the act as to any profession, occupation or business beyond that of insurance.

Having decided the provision to be valid, and all other

Aiken v. Nogle.

questions being waived, it follows that the petitioners must be remanded.

VALENTINE, J., concurring.

HORTON, C. J.: I do not think the word "trade," in the title of chapter 257, Laws of 1889, clearly or fairly indicates or includes lawyers, doctors, insurance agents, or insurance companies.

47	96
47	387
47	96
59	108
47	96
62	158

S. C. AIKEN, as Administrator of the estate of *Elmira A. Aiken, deceased*, v. EMMA C. NOGLE.

1. AGREEMENT—*Statute of Frauds*. An agreement to render services as a servant girl for another for \$100 per year, the services to commence at the date of such agreement, is not within the statute of frauds, (§ 6, ch. 43, ¶ 3166, Gen. Stat. of 1889,) as the agreement might have been performed within one year.
2. ——— *Payment for Services*. Where services have been actually rendered to another under a verbal agreement, not binding upon the parties on account of the provision of § 6, ch. 43, requiring the agreement to be in writing if not to be performed within one year, the party benefited thereby may be compelled to pay for the same.

*Error from Wabaunsee District Court.*

THIS was an action commenced by *Emma C. Nogle* against Mrs. *Elmira A. Aiken*, formerly Mrs. *Elmira A. Giles*, to recover \$658.35, and interest thereon, for wages as a servant. The petition alleges that the wages were due upon a verbal contract made between the parties about July 1, 1881; that by the terms of the verbal contract the defendant promised to pay to the plaintiff \$100 per year for each and every year she worked for her as a servant, and that the plaintiff worked for the defendant from about July 1, 1881, to February 6, 1888. The action was tried before the court with a jury at the June term, 1888, and the jury returned a verdict in favor of the

## Opinion of the Court.

plaintiff against Mrs. Aiken, for \$256.31. The court overruled the motion by the defendant for a new trial, and rendered judgment in favor of the plaintiff below upon the verdict of the jury. After the case was brought here by proceedings in error, Mrs. Aiken died, and the action was revived in this court in the name of her administrator, *S. C. Aiken*.

*John T. Bradley*, and *G. N. Elliott*, for plaintiff in error.

*J. F. Peffer*, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: The principal objections to the judgment are, that the contract between Emma Nogle and Mrs. Aiken, formerly Mrs. Giles, was verbal only, and therefore void under the statute of frauds, because it was not to be performed within the space of one year from the making thereof; (§ 6, ch. 43, relating to frauds and perjuries;) and because the cause of action was barred long before it was commenced. The statute of frauds cannot avail in this case. The evidence shows that the verbal contract was made about July 23, 1881, after Emma Nogle became of age. She entered upon her performance of the contract at once, and therefore the contract for the first year was good, notwithstanding the statute, on the ground that performance was not only possible, but was actually completed within the year. If the contract could not, by reason of the statute of frauds, extend into the second year, the jury had the right to determine what was the understanding with which the parties entered upon the second and other years of employment. If Mrs. Aiken agreed to pay her servant \$100 a year, commencing July 23, 1881, this was competent evidence from which to infer under what terms the parties continued their relations after that time until Emma ceased to work as a servant. The agreement between Emma Nogle and Mrs. Aiken may be construed as running for one year's service only, although it might have been, and really

was, continued for several years upon like terms. In *Sutphen v. Sutphen*, 30 Kas. 510, it was decided that—

“A parol agreement which, fairly and reasonably interpreted, admits of full performance within the year, although not likely to be so performed, will not be adjudged void by reason of the last prohibition in § 6 of the statute of frauds and perjuries.”

The established doctrine is that, to bring a case within the section of the statute of frauds referred to, there must be an express and specific agreement not to be performed within the space of one year, or the facts must show the agreement cannot be performed within the year. (*Kent v. Kent*, 62 N. Y. 560.)

But, again, the contract has been fully executed upon the part of Emma Nogle. She performed her services as a servant, without objection, from the 23d of July, 1881, to February 6, 1888. She was paid from time to time in clothing, and, when she finally quit service, she received and accepted further payments in dishes, bedding, etc. The balance of the wages found by the jury has never been paid. Where services have been rendered, the party benefited thereby must pay for them. There may be some differences in the form of the action, and perhaps the allegations in the original petition in this case may be subject to some criticism, but the facts developed upon the trial on the part of the plaintiff below fully sustain the verdict of the jury and the judgment rendered thereon. The statute of frauds cannot, and ought not to be, construed to permit palpable frauds. When one who need not have done the services because the promise was verbal has voluntarily performed the agreement for the actual benefit of the other party, he or she may have an action against the other for the services actually performed. Common honesty requires and compels such a ruling.

The statute of limitations has no application, because of the payments made and accepted from time to time in clothing, bedding, dishes, etc. (*Carney v. Havens*, 23 Kas. 82; *Waffle*

## Mullaney v. Humes.

v. Short, 25 id. 503.) The other errors alleged are unimportant, and in no way prejudicial.

The judgment of the district court will be affirmed.

All the Justices concurring.

J. F. MULLANEY *et al.* v. OLIVER HUMES.

47	99
48	399
47	99
51	684

**EVIDENCE** — *Certified Paper Not a Part of Case-made.* Where a case is made for the supreme court, and such case is settled and signed by the judge of the district court, and attested by the clerk thereof, and attached to such case is a paper containing what purports to be the evidence introduced on the trial in the district court, and it is certified to be such by the official stenographer of the court, and such evidence is not otherwise identified or authenticated, *held*, that it cannot be considered as any part of the case-made.

*Error from Rooks District Court.*

**REPLEVIN.** Judgment for plaintiff, *Humes*, at the November term, 1888. The defendants bring the case to this court. The opinion states the facts.

*W. B. Ham*, for plaintiffs in error.

*M. C. Reville*, for defendant in error.

The opinion of the court was delivered by

**VALENTINE, J.:** This was an ordinary action of replevin, brought in the district court of Rooks county by Oliver Humes against R. W. Swan and J. F. Mullaney, to recover certain live stock. The defendants answered separately, each filing a general denial, the same attorney appearing for both. A trial was had before the court without a jury, and the defendants demanded that a separate judgment should be rendered as to each of the defendants; but the court, finding upon the evidence in favor of the plaintiff and against the defendants, rendered a



---

Mullaney v. Humes.

---

joint judgment against them in the alternative for a return of the property or for its value and for costs; and the defendants bring the case to this court for review. They allege in this court that the court below erred: (1) In rendering judgment for the plaintiff upon the evidence; (2) In not rendering a separate judgment as to each of the defendants; (3) in its findings as to the value of the property; (4) and in overruling the defendants' motion for a new trial.

The decision of every question presented to this court by the defendants below, plaintiffs in error, depends upon a consideration of the evidence introduced upon the trial in the court below, and yet it cannot be said that we have such evidence before us in any such form that we can consider the same. The case is brought to this court upon a case-made for the supreme court. This case-made contains the following statements:

"The foregoing contains a true and correct statement of all the pleadings, motions, orders, evidence, findings and proceedings upon which judgment was rendered.

"I, C. W. Smith, the undersigned attorney for the plaintiff in the foregoing suit, certify that the foregoing case-made was duly served on me, this 25th day of January, 1889.

C. W. SMITH, *Attorney for Oliver Humes, Plaintiff.*"

"STATE OF KANSAS, ROOKS COUNTY, SS.—This is to certify, that the foregoing above case-made and the amendments thereto have been duly served in due time, and the amendments thereto duly suggested and the same duly submitted for settlement and signing as required by law, by the parties to said cause; that the same, as above set forth, is true and correct, and contains a true and correct statement of all the pleadings, motions, orders, evidence, findings, proceedings and judgments had in such cause; and I hereby settle, allow, certify and sign the same as true and correct, and hereby order that the clerk of the district court attest the same with the name and seal of said court, and file the same of record as provided by law.

"WITNESS MY HAND, At Norton, Kansas, this 29th day of March, 1889.

LOUIS K. PRATT,  
*Judge of District Court.*

"Attest: GEO. O. FARR,  
[SEAL.] *Clerk of Dist. Court, Rooks Co., Kansas.*"

---

School District v. Goff.

---

No evidence appears in the case-made preceding these statements, but after these statements and after the attestation of the case-made by the clerk of the district court, is a paper attached containing about 40 pages of what purports to be the evidence introduced on the trial in the district court, which evidence is certified to by M. D. Barstow, the official stenographer of the district court, as follows:

"STATE OF KANSAS, NORTON COUNTY, SS.—I hereby certify that the foregoing is a true and correct transcript of the short-hand notes taken by me of all the evidence produced on the trial of the above-entitled cause, and the same is correct, to the best of my knowledge and belief.

M. D. BARSTOW,

*Official Stenographer of the 17th Judicial District of Kansas."*

There is nothing anywhere else to be found to identify this evidence, and without it we cannot review any of the alleged errors. It is certainly no part of the case-made.

The judgment of the court below will be affirmed.

All the Justices concurring.

---

SCHOOL DISTRICT NO. 54, OF CRAWFORD COUNTY, V.  
WM. GOFF *et al.*

*The case of Mullaney v. Humes, just decided, followed.*

*Error from Crawford District Court.*

INJUNCTION. Judgment for plaintiffs, Goff and another, at the September term, 1887. The defendant School District brings the case here.

John T. Voss, for plaintiff in error.

W. R. Cowley, for defendants in error.

*Per Curiam:* This was an action brought in the district court of Crawford county, by William Goff and Charlotte H. Goff, husband and wife, against School District No. 54, Crawford county, Kansas, and C. Beck, John Pauley, and Frederick Russell, the officers of such school district, to perpetually enjoin them from removing a certain building situated on the homestead of the plaintiffs and their children, which building had previously been occupied as a school-house. A trial was had before the court and a jury, and the jury made special findings of fact, and the court found generally in favor of the plaintiffs and against the defendants, and upon the special findings of the jury and the general finding of the court, the court rendered judgment in favor of the plaintiffs and against the defendants, perpetually enjoining the defendants from removing said building; and the defendants, as plaintiffs in error, bring the case to this court for review.

Within the authority of the decision in the case of *Mullaney v. Humes*, just decided, the judgment of the court below in the present case must be affirmed, as none of the evidence nor any of the instructions of the court to the jury are contained in the case made, or presented to this court in any other proper manner. It is true that it is claimed that the petition below and the findings are not sufficient to sustain the judgment rendered, but it is so clear that they are, that we do not think that the question of their sufficiency requires any comment.

The judgment of the court below will be affirmed.

## S. D. HOPKINS v. EMALINE HOPKINS.

1. *REVIEW—Evidence not Duly in Record.* Evidence purporting to have been given on the trial of a case, and certified to by the official stenographer and by the clerk of the district court to be true and correct, and attached to a transcript brought to the supreme court, forms no part of the record, and cannot be considered unless it is preserved either by a bill of exceptions or case-made.
2. ——— *Setting Aside Default.* The setting aside of defaults and permitting pleadings to be filed out of time is largely discretionary with the trial court, and its rulings thereon will not be disturbed unless there is a clear abuse of discretion.

*Error from Allen District Court.*

THE opinion states the case.

*Knight & Foust*, for plaintiff in error.

The opinion of the court was delivered by

JOHNSTON, J.: In this action Emaline Hopkins obtained a judgment against S. D. Hopkins for \$700, which judgment was declared a lien against certain real estate, the legal title of which was in S. D. Hopkins. He complains, and his proceeding in this court is based on a transcript of the record. The errors assigned are mainly those arising only upon the evidence and the rulings during the trial. Although what purports to be the evidence is attached to the petition in error, and certified to by the official stenographer and the clerk of the district court as being full and correct, it is not preserved either by a bill of exceptions or a case-made. For this reason, neither the evidence nor the proceedings of the trial which form no part of the record can be considered.

It is urged that the court erred in permitting plaintiff below to file a reply out of time. It appears a reply was filed a few days beyond the time allowed by the code, and the court on application struck the reply from the files, but at once set aside the default and authorized the filing of another reply

*instantan*. The trial did not occur, however, until about one year after the setting aside of the default and the filing of the reply, and hence the plaintiff in error could not have suffered any prejudice by the ruling. The matter of setting aside defaults and permitting pleadings to be filed out of time largely rests in the discretion of the trial court, and its rulings thereon will not be disturbed unless there is a clear abuse of discretion. (*Spratley v. Insurance Co.*, 5 Kas. 155.) There was no such abuse in this case, and there are no errors apparent on the face of the record.

Judgment affirmed.

All the Justices concurring.

47	104
58	495

47	104
67	187

47	104
77	587

### THE BOARD OF COMMISSIONERS OF HAMILTON COUNTY v. L. J. WEBB.

COUNTY BOARD—*Void Contract*. Where a contract is entered into between two members of the board of county commissioners on the one side and an individual on the other side, outside of their county and without any previous authority having been given by the board, and such contract has never been ratified by the board, *held*, that it is void.

*Error from Hamilton District Court.*

THE opinion states the case.

*George Getty*, for plaintiff in error.

*Webb & Lindsay*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This controversy grows out of a proceeding originally instituted by the defendant in error, L. J. Webb, before the board of county commissioners of Hamilton county. On December 12, 1887, Webb filed with the county clerk and the board of county commissioners of Hamilton

## Opinion of the Court.

county his claim against the county for \$1,000, based upon an alleged contract attached thereto, dated November 6, 1887. This claim was finally rejected by the board, and Webb appealed to the district court, where, on February 1, 1889, the case was tried before the court without a jury, and judgment was rendered in favor of the plaintiff, Webb, and against the defendant, the board of county commissioners, for the sum of \$1,070, and costs of suit; and the defendant, as plaintiff in error, brings the case to this court for review.

Many questions are presented to this court, among which is the question of the validity of the contract upon which the plaintiff below, Webb, bases his claim. It purports to be a contract between the board of county commissioners of Hamilton county and Webb, employing him as an attorney and counselor at law to perform legal services in certain cases pending in the supreme court, and agreeing to pay him therefor the sum of \$1,000. It appears, however, conclusively from the evidence in the case that the contract was not made by the board of county commissioners, nor in legal session, nor at the county seat, nor in Hamilton county, nor by all the members of the board, nor in the presence of the county clerk or county attorney; but it was made by only two members of the board, at the city of Topeka, and these two members made the contract without any previous authority from the board, and the contract has never been ratified, confirmed or recognized as legal or valid by the board. Such a contract is of course void. (*Merrick Co. v. Batty*, 10 Neb. 176; *P. & F. R. Rly. Co. v. Comm'rs of Anderson Co.*, 16 Kas. 302; *Comm'rs of Anderson Co. v. P. & F. R. Rly. Co.*, 20 id. 534; *Aikman v. School District*, 27 id. 129; *Mincer v. School District*, 27 id. 253; *Sullivan v. School District*, 39 id. 347.)

As the aforesaid contract was and is void, and as the case was tried by the court below upon the theory that the contract was entirely valid, it follows that the judgment of the court below must be reversed. But it does not follow, however, that the plaintiff below, Webb, is entirely without remedy, or that he cannot recover anything for any of his services. The tend-

ency of the courts and others at the present time is to treat corporations, including municipal corporations, with respect to their business transactions, about the same as the courts and others treat individuals; and where a corporation, municipal or otherwise, has received benefits from others, upon contracts *ultra vires* or void because of some irregularity or want of power in their creation, but not void because made in violation of express law, or good morals, or public policy, and where the corporation retains such benefits, it must pay for them. (*City of Ellsworth v. Rossiter*, 46 Kas. 237, and cases there cited.) It would seem from the record in the present case, that for some of the services performed by Webb the county cannot possibly be liable, for it would seem that the county had no interest in them, but that they related purely to private matters between individuals. But as to others of such services it would seem otherwise, and that the county might be liable as for benefits received. (See also *Thacher v. Comm'rs of Jefferson Co.*, 13 Kas. 182.) All these questions, however, may be considered upon a new trial, where the parties may show just how far the county was interested, and how far not, and what benefits the county may have received from the plaintiff's services.

The judgment of the court below will be reversed, and the cause remanded for a new trial.

All the Justices concurring.

THE ATCHISON, TOPEKA & SANTA FÉ RAILROAD COMPANY V. CHESTER R. PLASKETT, *by his next friend and father, G. R. Plaskett.*

47	107
47	112
47	116
47	107
54	559
47	107
57	191

*CHILD, Injured—Company not Liable for Damages.* Where a railroad company stops its train not to exceed a minute, as it approaches a railroad crossing within the limits of an incorporated city, and while its cars are standing over a street crossing a child seven years of age, on his way home from school, attempts to take hold of the brake ladder on a freight car in the train, for the purpose of climbing over the car, and the train starts just as he makes the effort to get onto the car, and jerks him off so that he falls under the wheels and is run over and injured, and the train-men have no knowledge of the attempt upon the part of the boy to board the train, *held*, that the company is not guilty of such negligence toward the boy as to render it liable for damages on account of such injury.

*Error from McPherson District Court.*

ACTION to recover damages for bodily injuries. Judgment for plaintiff, *Plaskett*, at the October term, 1888, for \$6,000 damages. The defendant *Company* brings the case to this court. The facts appear in the opinion.

*Geo. R. Peck, A. A. Hurd, and Robert Dunlap*, for plaintiff in error.

*Lucien Earle, and C. M. Bruce*, for defendant in error.

Opinion by GREEN, C.: This was an action brought by Chester R. Plaskett, by his next friend and father, G. R. Plaskett, against the Atchison, Topeka & Santa Fé Railroad Company, for damages alleged to have been caused by the negligence of the defendant. The action was tried before the court and jury in McPherson county, and resulted in a verdict and judgment for \$6,000 for the plaintiff. A number of errors are assigned, for which a reversal is asked.

The undisputed facts in this case are: That on the 5th day of December, 1887, a freight train consisting of 27 or 28 cars passed through McPherson, between three and four o'clock in



the afternoon, going east. The railroad track, in the limits of the city, is located about the middle of Simpson street, which runs east and west; among the streets running north and south, and in the order named extending east, are Main, Ash, Elm, and Oak. As the train crossed the last-named street, it whistled and stopped for the Rock Island crossing. The plaintiff, who was at that time seven years and two months old, was returning from school along Oak street, to his home, situated on the north side of the track from the school-house, which was located one block from the intersection of Simpson and Oak streets. The child was accompanied by some eight or ten boys and girls about his own age, going north along Oak street, on the sidewalk. As they reached the crossing, they found the street obstructed by this freight train, and, according to the evidence of the plaintiff, it had been standing there about a minute, when he went up to the train and one of his schoolmates said to him, "Let us climb over across and go home;" and when that was said he started to climb over, and the train moved; that he caught hold of the rod or ladder by which the brakemen climb to the top of the cars, before the train started; that the boy with him helped him to get onto the cars, and, after he got hold, the train moved. The movement of the train jerked him under the cars and the wheels passed over his right leg, making amputation necessary below the knee. There was no flagman or gates at this crossing, which was one of the principal crossings of the city, which contained at that time a population of some 5,000. The special findings of the jury are as follows:

"1. Did the plaintiff, Chester R. Plaskett, take hold of defendant's train? Ans. Yes.

"2. If yes, was the said train in motion and moving and being moved at the time plaintiff took hold of it? A. No.

"3. Did the plaintiff attempt to get on the defendant's train while the same was in motion? A. No.

"4. Did the plaintiff know that there was danger in attempting to get on the defendant's train under the circumstances? A. No.

"5. If your answer to the last question be no, state fully

## Opinion of the Court.

the reason that he did not know of said danger. A. He was too young to know danger.

"6. Was the defendant guilty of willful and gross negligence toward the plaintiff under the circumstances? A. They were guilty of gross negligence, not willful.

"7. If yes, state fully in what such willful and gross negligence consists? A. In the train-men knowing this place was frequented by school children, and not being on the lookout.

"8. Was the defendant guilty of ordinary negligence under the circumstances? A. Yes.

"9. If your answer to the last question be yes, state particularly in what said negligence consisted. A. The train-men not being at their proper places.

"10. How many school children necessarily used the sidewalk and crossing where the accident occurred? A. From 40 to 60.

"11. If you find for the plaintiff, how much damages do you allow him for physical pain and mental suffering? A. One thousand dollars (\$1,000).

"12. How much do you allow—how much damages do you allow plaintiff as the natural and probable result of the injury? A. Five thousand dollars (\$5,000).

"13. How much do you allow plaintiff as exemplary damages? A. 000.

"14. Did the acts of the plaintiff contribute to the injury? A. Yes."

The first, and perhaps the only question for our determination in this case is, whether the railroad company was guilty of any negligence, or violated any duty which it owed to this child, as it ran its train through the city of McPherson. It is unnecessary for us to discuss the different degrees of negligence, for the reason that most courts of last resort, notably the supreme court of the United States, fail to recognize any negligence unless it be culpable. The findings of the jury, upon which negligence is predicated in this case, consist in the fact that the train-men knew that the crossing where the accident occurred was frequented by children going to and from school; that they were not on the lookout for persons crossing the track, or in a proper position upon the train to prevent persons from climbing on the cars. These were the only findings imputing negligence to the defendant below. It was a

proper precautionary measure for the company to stop its train at the crossing of another railroad, and one which the law recognizes. The evidence indicated that the train was running at a slow rate of speed through the city, and came to a full stop as it approached the Rock Island crossing, and immediately started again; the engineer, fireman and forward brakeman were on the engine, and looked to see that the track was clear; they did not see the plaintiff attempt to board the train. Can it be successfully claimed that the defendant owed a duty to this child to have men posted at proper intervals on top of the train to keep vigilant watch and see that he did not attempt to climb upon its cars? While greater care is demanded in the operation of trains in populous cities than in sparsely-settled districts through which a railroad may run, we do not think the law imposes any such a duty upon a railroad, even in cities. It would be difficult to conceive how a train could be successfully guarded so as to prevent persons from climbing on to the cars at crossings, or moving at a low rate of speed through towns and villages.

But it is claimed that the railroad company did owe to this child the duty of active vigilance, to see that he was not injured; that the condition of things at the crossing in question, the population of the city, and the almost constant travel over the railroad track, being but a block from the school-house where 700 or 800 children were in attendance; and that the safety of these children demanded the utmost care and the greatest precaution upon the part of the company. It is doubtless true that this crossing was used a great deal by children going to and from school, and it therefore became necessary to exercise a great degree of care to prevent accidents, but the regulation of this and the other crossings rested primarily with the city authorities, and the failure to properly guard these crossings can hardly be charged as negligence upon the part of the defendant when no ordinance of the city required it. To uphold the verdict and judgment in this case, there must be some negligence chargeable to the railroad company. The tender years of the child may indeed excuse him from

## Opinion of the Court.

concurring negligence in this case, but his inability to contribute to the cause of the injury, on account of his youthfulness, cannot supply that negligence which the law says must exist before he would be entitled to recover damages. In a case not unlike this in many respects, this court has said:

"In all courts culpable negligence consists in the failure to exercise the amount of care required, whether that amount be slight, ordinary, or great, and whether the corresponding degree of negligence be called gross, ordinary, or slight, or merely negligence. In the present case, we take it that all the parties having any connection with said accident were required to exercise that degree of care and diligence which an ordinarily prudent person would exercise under like circumstances. This is ordinary care, and the failure to exercise it would be ordinary negligence, or culpable negligence, or, as some courts would say, merely negligence, and if all the parties in this case exercised ordinary care, then no one was guilty of culpable negligence. Now, all negligence, to be culpable, necessarily implies the failure to properly perform some duty. Now, what duty did the railroad company owe to Charles W. Henigh which it did not properly perform? No relation existed between them. He was not a passenger, nor an employé, and had no business with the railroad company of any kind or character. He had no right to climb upon said car as he did, nor to touch it, nor even to go upon the company's premises. Technically, he was a mere trespasser, and the company owed to him no duty except such as it owes to trespassers in general, or except such as it owes to all mankind. We have heretofore held that all persons must use their property and conduct their affairs with reference to the rights of all other persons, and with reference to all known or anticipated surroundings, and that even trespassers have a right to expect that such will be done. (*K. C. Rly. Co. v. Fitzsimmons*, 22 Kas. 686, 690, *et seq.*; *K. P. Rly. Co. v. Brady*, 17 id. 380, 384, *et seq.*) And we will still adhere to this doctrine. But no person is bound to anticipate something which is not likely to occur, or to so conduct his affairs as to prevent accidents which are not likely to happen. This has reference where no specific duty exists, but only such general duties as all mankind owe to each other." (*C. B. U. P. Rld. Co. v. Henigh*, 23 Kas. 347.)

See also the case of *A. & N. Rld. Co. v. Flinn*, 24 Kas. 627.

The principle decided in these two cases settles the question of the liability of the railroad company in this case. We do not think any wrong was shown upon the part of the plaintiff in error.

We recommend a reversal of the judgment of the court below.

By the Court: It is so ordered.

All the Justices concurring.

*Per Curiam:* The case of A. T. & S. F. RLD. Co. v. PLASKETT, No. 5665, was submitted with the case of the same title, also from McPherson district court. All of the questions involved in this case were also involved in that, and the judgment of the court below is reversed upon the authority of that case.

47	112
e96	185

47	112
74	573

THE ATCHISON, TOPEKA & SANTA FÉ RAILROAD COMPANY V. CHESTER R. PLASKETT, *by his next friend and father, G. R. Plaskett.*

ACCIDENT at Railroad Crossing—Company, not Negligent. As it approached the crossing of another railroad in a city of 5,000 inhabitants, a freight train stopped not to exceed a minute, so as to block one of the principal streets of the city near a public school building. A boy seven years old tried to climb over the cars. He was not seen by the train-men. The train started, and he was thrown off and injured. The jury found that the company was negligent, in that the train-men knew that the crossing was frequented by children, and were not on the lookout. *Held,* That there was no evidence of negligence on the part of the company.

*Motion for Rehearing.*

THE facts are substantially stated in the opinion, filed October 10, 1891.

*Lucien Earle, and C. M. Bruce, for the motion.*

*Geo. R. Peck, A. A. Hurd, and Robert Dunlap, contra.*

*Per Curiam:* In support of the motion for a rehearing in this case several cases have been cited, notably, *Chicago City Railway Co. v. Wilcox*, 27 N. E. Rep. 899; *Avey v. Galveston &c. Co.*, 17 S. W. Rep. 31, and other like cases, deciding that where a child of tender years is injured by the negligence of another, the negligence of his parents, even though present at the time of the accident, cannot be imputed to him. We may fully assent to all decided in those cases, but that does not change or modify the former opinion handed down. Even if it be conceded that the little boy who was injured is so young in years as to be incapable of such conduct as will constitute contributory negligence, and if it also be conceded that any contributory negligence on the part of the parents cannot be imputed to the boy, these do not supply the place of negligence on the part of the railroad company. If the company was not negligent, it is not liable for damages on account of the injury complained of. The former opinion disposes of the case upon the ground that negligence cannot be imputed to the company. The train was stopped not exceeding a minute, as it approached a railroad crossing within the city of McPherson. Its stop at the railroad crossing was both necessary and lawful, in order to prevent any collision with other trains which might have been on the Rock Island road. In stopping, no statute or city ordinance was violated or disregarded. The statute recognizes such stops before crossing the track of another company, where the railroad companies have not a system of interlocking or automatic signals. (Gen. Stat. 1889, §§ 1362-1364.) If it be urged that the brakemen or train-men ought to have been at their stations to prevent school children from climbing on or under the cars during the momentary stoppage of the train, the answer is, that the object of having brakemen upon the train is to enable them to be in a position where they may handle the brakes, give

signals, etc. The lookout to be kept by the engineer, fireman and train-men is generally ahead of the train. If the boy had been seen upon the car by the train-men, then it would have been their duty to have exercised proper care in not running over or injuring him. But when a train momentarily stops at a crossing, and the train-men are not needed in the operation of the train at their respective stations, it cannot be said that the company is guilty of negligence because, although the train itself is properly operated, the train-men are not given express instructions to keep away thoughtless children from climbing under or upon the train. If it were the duty of the train-men to keep a lookout to prevent thoughtless children from climbing on or under their train when crossing the public street at a slow rate or when momentarily stopping in a public street, before crossing another railroad, then the brakemen or train-men, instead of being at their usual or proper places upon the cars to handle the brakes, give signals, etc., should be upon the ground, near by the several cars of the train, watching the cars or patrolling the ground around the cars, to prevent children and others from getting on or under them. The jury do not find that the train-men should have been upon the ground watching or patrolling the train. No such claim is made. If the train had stopped an unnecessary length of time, and become an obstruction upon the street, as in the Pennsylvania case referred to, or if the train in stopping at the street violated any city ordinance, any municipal provision, or any statute of the state, negligence could be imputed, and a liability based thereon.

We repeat what was said in the former opinion. "We do not think any wrong was shown upon the part of the railroad company." Negligence against the company was not established, and therefore no liability was shown. The only alleged negligence found by the jury was that the brakemen or train-men were not at their proper places. Nothing else was found. If they had been at their usual or proper places on the cars for the operation of the train, they would not, in the performance of their usual or general duties, have been watch-

---

Decision by the Court.

---

ing, or looking out to prevent children or others from climbing on or under the cars, when the train was in motion, or when it momentarily stopped.

The Henigh case, referred to in the former opinion, differs somewhat from the facts in this case, and we do not base the reversal of the judgment upon that case alone. It was commented upon, but in this case we think no negligence, upon the evidence, can be imputed to the railroad company, and hence the reversal. The finding of the jury that there was negligence is not conclusive. "If the findings in detail contradict the general finding, we may order the judgment to be rendered in accordance with the findings in detail, and wholly ignore the general findings. For instance, where a question of negligence arises in a case, the jury cannot be allowed to say conclusively, after finding certain special facts, that these facts constitute negligence, when in fact and manifestly they do not constitute negligence." (*A. T. & S. F. Rld. Co. v. Plunkett*, 25 Kas. 188.) Of course, where any finding is contrary to the evidence, such finding is of no value or importance as establishing negligence; and any of the findings of the jury in this case, not supported by the evidence, cannot be used to support a verdict or sustain a judgment. The jury expressly relieved the railroad company from any willful negligence or intentional violence or injury; therefore, from the findings of the jury, it is clearly established that no train-man or other employé of the company willfully or purposely hurt the little boy. He was not seen climbing on the car, and his imprudence was not expected or anticipated.

The rehearing will be denied. In No. 5665, same title, under the above and foregoing opinion, the rehearing will also be denied.



## WALTER GRIFFIN V. B. O'NEIL.

1. **BILL OF PARTICULARS, Sufficient.** The bill of particulars in this case sufficiently states a cause of action for the recovery of a balance due on the transaction therein set out.
2. **DEMURRER—Evidence.** The demurrer to the evidence of the plaintiff was properly overruled. Such evidence held sufficient to support the verdict and judgment therein.
3. ——— **New Trial.** Defendant not entitled to new trial on the ground of accident.

*Error from Anderson District Court.*

THE opinion states the facts.

*Johnson & Johnson*, for plaintiff in error.

*Kirk & Bowman*, for defendant in error.

Opinion by STRANG, C.: This action was begun before a justice of the peace October 1, 1887, and judgment entered for plaintiff October 7, 1887, for \$107 and costs. Appeal taken to district court of Anderson county, where it was tried by the court and a jury March 22, 1888, resulting in a like judgment. The defendant objected to the reception of any evidence under the bill of particulars in the case, alleging that it did not contain facts sufficient to state a cause of action. This objection was carried all through the case, and raises the question relied on for a reversal of the case here. It is claimed that if this is treated as an action to reform the contract for the sale of the cattle, the bill of particulars does not allege a mutual mistake in the contract, but simply alleges a mistake on the part of the plaintiff, which is not a sufficient allegation to constitute a cause of action for the reformation of a contract.

We do not think the bill of particulars attempts to state a cause of action for the reformation of a contract. If that had been the object sought in the action, it is not likely it would have been brought before a justice of the peace. Nor do we

## Opinion of the Court.

think the plaintiff in his cause of action attempts to rescind the contract for the sale of the cattle, as the defendant argues in support of his demurrer to the evidence of the plaintiff. We think the plaintiff in his action, in effect, affirms the contract of sale, and sues for a balance due. He does not base his action upon a bill of sale, nor upon any other written contract. He brings it for the recovery of an unpaid balance due on a cattle deal between himself and the defendant, and sets up the whole transaction with all its attending circumstances. The bill of particulars alleges that on September 20, 1887, the plaintiff sold to the defendant —

4 steers, at \$32 per head, amounting to.....	\$128 00
10 steers, at \$36 per head, amounting to.....	360 00
4 cows, weighing 4,500 lbs., at 2c. per lb., amounting to,	90 00
1 cow at \$17.....	17 00
And all of the aggregate value of.....	\$595 00

It then credits the defendant with \$488 paid thereon, and claims a balance of \$107, which it alleges the defendant refuses to pay. This is the statement of the plaintiff's cause of action. The circumstances attending the deal, including the allegation of mistake in figuring the aggregate price of the cattle by the plaintiff, which is also set out in the bill of particulars, are merely explanatory of the transaction, and not controlling elements thereof. In this view of the case, we think the bill of particulars states a cause of action in favor of the plaintiff against the defendant for the balance claimed, and such action was properly brought before a justice of the peace. The affidavit filed with the motion for a new trial, as well as the conduct of the case by counsel for defendant, shows that the defendant claims that he purchased the 19 head of cattle for the aggregate sum of \$488, and that he has therefore paid the full consideration for the cattle. We think, however, the evidence of the plaintiff made a *prima facie* case in favor of his allegation that he sold the 19 head of cattle for the sum of \$595, and that the court did not, therefore, err in overruling the defendant's demurrer to the plaintiff's evidence. We also think the evidence sufficient to sustain the verdict and

judgment thereon. This leaves but one further question in the case.

Was the defendant entitled to a new trial because of unavoidable accident, as claimed in his affidavit filed with his motion for a new trial? We think not. The alleged accident consists in a failure of the defendant to receive a telegraphic message in time for him to attend the trial of the case. The accident was merely the miscarriage of an arrangement by the plaintiff with his own attorneys and the telegraph operator at the station nearest his home, for the transmission and delivery to him of a message giving him information concerning the trial of his case. His failure to receive the message in time was not the result of accident at all, but of the negligence of his own agent. If there had arisen a storm of such a character as to have prevented the transmission of the message over the wires in time to notify the defendant so he could be present at the trial, or of such a character as to have prevented the defendant traveling to the place of trial, it might be said he was prevented by accident, but a mere failure of his own agents to do as he alleges they promised to, in connection with the transmission or delivery of a message, is not an accident. The affidavit shows that the message was received by the agent at 8 o'clock in the morning, and that he did not get it delivered in the country to the defendant until it was too late for him to attend the trial. It was not the business of the agent, as the agent of the telegraph company, to deliver the message away from his office, in the country. He was only required to do so in this instance by his agreement with the defendant, and whatever he did or neglected to do under such agreement, he did or neglected as the agent of the defendant. We do not think a failure of the defendant's agent to deliver a message to him, as per request or agreement, in time for him to attend the trial furnishes the defendant with any cause, known to the law, for a new trial. He made an arrangement with his own agents for notice. He in no wise relied on any arrangement with the plaintiff, nor with the court. He relied upon his own agents, and without

The State, *ex rel.*, v. Stover.

any accident or excuse, so far as we know, they failed him, and we cannot relieve him from the consequences.

We find no material error in the record of this case, and therefore recommend that the judgment of the trial court be affirmed.

By the Court: It is so ordered.

All the Justices concurring.

47 119,  
47 563

THE STATE OF KANSAS, on the relation of the Board of Regents of the State Normal School, v. S. G. STOVER, as Treasurer of the State of Kansas.

1. **CASE, Followed.** The case of *Martin v. Francis*, 13 Kas. 220, cited and followed.
2. **NORMAL SCHOOL FUND—Interest, How Drawn from State Treasury.** The statutes of the state require that all moneys derived from the sale of lands of the state normal school, both principal and interest, less the commissions allowed for the sale thereof, shall be paid into the state treasury, where it constitutes the state normal school fund. The interest on this fund is paid to and received by the state treasurer as an officer of the state, and the statute requires him to deposit it in the state treasury. The interest of this fund cannot be drawn from the state treasury by the board of regents of the state normal school, or any officer thereof, except in pursuance of an act of the legislature specifically authorizing the same to be done, passed within two years prior thereto.

*Original Proceeding in Mandamus.*

**ACTION** of mandamus by *The State*, on the relation of the board of regents of the state normal school, at Emporia, to compel *S. G. Stover*, as state treasurer, to pay certain moneys to the treasurer of said board. The material facts appear in the opinion, filed October 10, 1891.

*J. Jay Buck*, and *I. E. Lambert*, for plaintiff.

*John N. Ives*, attorney general, for defendant.

The opinion of the court was delivered by

HORTON C. J.: This is an action of *mandamus* by the state of Kansas, upon the relation of the board of regents of the state normal school, at Emporia, against S. G. Stover, the state treasurer, to compel him to pay to the treasurer of the board \$1,700 upon its written order, from interest in his hands, on the state normal school fund. The state treasurer refuses to pay the order presented, and also refuses to pay any other order of the board of regents, upon the ground that there has been no appropriation by the legislature of any moneys accruing from the interest of the state normal school fund, as required by the constitution of the state. Section 24 of article 2 of the constitution ordains, "that no money shall be drawn from the treasury, except in pursuance of a specific appropriation made by law; and no appropriation shall be for a longer term than two years." The sole question in this case is, whether the interest of the state normal school fund can be disbursed by the treasurer of the state upon the orders of the board of regents of the state normal school without an appropriation by the legislature. In 1863, the legislature of the state established and permanently located at Emporia a state normal school. At the same time it set apart and reserved as a perpetual endowment for the support and maintenance of the normal school certain lands granted to the state by the fourth subdivision of the third section of the act of congress admitting Kansas into the union. (Laws of 1863, ch. 57; §§ 6310, 6312, Gen. Stat. of 1889.) In 1872, the legislature passed an act providing for the sale of lands belonging to the normal school. Section 4 of that act provided: "All moneys derived from the sales of lands under the provisions of this act, both principal and interest, less the amount of commissions allowed by the board of directors for the sale thereof, shall be paid into the state treasury, where it shall constitute the 'state normal school fund,' for said institution." (Laws of 1872, ch. 189; § 6333, Gen. Stat. of 1889.) In 1886, the legislature granted to the normal school a further endowment of 12 sections of

## Opinion of the Court.

land. (Laws of 1886, ch. 156.) In 1879, the legislature enacted the following provision: "All moneys belonging to the . . . state normal school fund . . . shall be deposited with and paid to the state treasurer, and be subject to the order of the board of school-fund commissioners." (Laws of 1879, ch. 166, § 49; ¶ 6594, Gen. Stat. of 1889.) Sec. 117 of ch. 166, as amended by the Laws of 1883, ch. 143, § 1, now reads:

"Said board of commissioners shall have the power, and it is hereby made their duty, from time to time to invest any moneys belonging to the . . . state normal school fund, . . . in the bonds of the state of Kansas or of the United States, school-district bonds of the several school districts of the state of Kansas, bridge, court-house bonds, or in county, township, or city refunding bonds of the several counties, townships and cities of the state of Kansas." (Gen. Stat. of 1889, ¶ 6654.)

From the provisions of § 4, chapter 189, Laws of 1872, and § 49, chapter 166, Laws of 1879, we are of the opinion that all moneys derived from the sale of the lands of the normal school, both principal and interest, less the commissions for the sales of the lands, are expressly required to be paid into the state treasury. These sums constitute "the state normal school fund." The interest on this fund, which the board of regents, through its president and secretary, now desire to draw from the possession of the defendant, who is the treasurer of the state, is rightfully in his hands as state treasurer. It is therefore rightfully in the state treasury. If it is in the state treasury, and rightfully there, then it cannot be drawn therefrom except in pursuance of an act of the legislature specifically authorizing the same to be done. (*Martin v. Francis*, 13 Kas. 220.)

There was no appropriation made at the late session of the legislature for the payment of the class of orders or warrants issued to the state treasurer by the president and secretary of the board of regents. As the interest, as well as the principal, of the state normal school fund is rightfully and legally in the state treasury, the state treasurer has no lawful power,

1. Case, followed.

---

The State, *ex rel.*, v. Stover.

---

under the provisions of the constitution of the state, to honor or pay the order drawn upon him. It is contended, however, that the language of § 4, chapter 189, Session Laws of 1872, and of § 3, chapter 156, Laws of 1886, which authorizes the interest of the school fund to be subject to the order of the president and secretary of the board of regents, and permits them to use the same as the needs of the school shall require, make the state treasurer the agent of the board of regents, and that the interest derived from the state normal school fund is to be held by the state treasurer as the agent of the board, not otherwise. The statute, however, expressly provides that the interest, as well as the principal, "shall be paid into the state treasury;" not that it shall be paid to the person holding the office of state treasurer, or to the agent of the board of regents. The provision in the statute for the board of regents to use the interest for the support and maintenance of the state normal school must be read in connection with the provisions of the constitution of the state, and the use by the board is subject to the limitations prescribed in the constitution. (Const., art. 2, § 24.)

The contention that the board of regents, under the statute, has the power to use the interest on the state normal school fund without an appropriation by the legislature, is disposed of by the decision in *Martin v. Francis*, supra. The legislature, in 1871, by chapter 39, § 17, provided for the creation of an insurance fund out of the fees to be paid to the state superintendent of insurance, and also provided that the fees should be paid into the state treasury by the superintendent of insurance when collected. In another section of the same act, it was provided that the expenses of the insurance department should be paid out of the insurance fund upon the order of the superintendent of insurance. This court, in construing this statute, decided that, although it expressly stated that the expenses of the insurance department were to be paid out of the insurance fund upon the order of the superintendent of insurance, they could not be so paid except in pursuance of an act of the legislature specifically authorizing the same to

## Opinion of the Court.

be done. The language referred to in chapter 189, Laws of 1872, and chapter 156, Laws of 1886, as to the use of the interest of the normal school fund by the board of regents, is similar to the language of the statute of 1871 concerning the use of the insurance fund by the superintendent of insurance. The construction given by this court to the statute of 1871, relating to the insurance department, and § 24 of article 2 of the constitution of the state, if followed in this case, forbids the board of regents to use the interest of the normal school fund rightfully in the

2. Normal school fund—interest, how drawn from state treasury.

state treasury, except in pursuance of an appropriation by the legislature, passed within two years prior thereto. We have no disposition to reconsider or change the decision in *Martin v. Francis*, supra.

Again, it is contended that, as the legislature in 1877 expressly enacted "that no appropriation should be made for the state normal school in the future;" and again enacted in 1886 "that the legislature would not in the future appropriate anything for salaries or incidental expenses for the state normal school," these expressions of the legislature are controlling in favor of the board of regents using the interest on the state normal school fund without any specific appropriation, as, in the absence of an appropriation, the school cannot be successfully carried on without the use of the interest. These provisions of the legislature are not binding upon any subsequent legislature, and in fact the subsequent legislatures have regarded them "more in the breach than in the observance." In 1879, the legislature appropriated \$25,000 for the purpose of rebuilding the state normal school. In 1885, the legislature appropriated money<sup>3</sup> to the school, not only for fuel, water, gas, and repairs, but also for furniture, mathematical and chemical apparatus, for designs for the drawing department, etc. In 1891, the legislature appropriated for the school for the years of 1891, 1892, and 1893, in addition to the money provided for fuel, water, gas, and permanent improvements, over \$2,000 for incidental expenses. But even if the legislature had said, or had intended to say, that the board of



---

The State, *ex rel.*, v. Stover.

---

regents could use the interest of the state normal school fund, which, under the statute, was rightfully in the treasury of the state, without any specific appropriation, such an act would be in violation of the constitution, and void. We have fully considered the practice which has prevailed so many years between the board of directors or regents of the normal school and the state treasury department, in allowing orders to be drawn and paid out of the state treasury without any special appropriation; but the practice of the school and state officials cannot be sustained, if contrary to the provisions of the constitution. That is the paramount law. Section 24 of article 2 of the constitution is clear and emphatic in its terms. It has already been construed by this court.

Finally, it is suggested, not very strongly, however, that, on account of the provisions of the several acts of the legislature referred to, there is a contract executed between the state and state normal school, whereby the endowment of the lands, together with the proceeds thereof, are in the nature of an absolute donation or grant which cannot be repealed, changed, or impaired; that neither the state nor the legislature has any control whatever over the endowment fund, whether it be principal or interest, and that the officials of the state normal school have the exclusive authority to use for its support and maintenance all the funds of the institution. The complete reply to this suggestion is, that the state normal school is not a corporation *de jure* or *de facto*. It has never organized, or attempted to organize under the statutes relating to corporations. The legislature has no authority to pass any special act conferring corporate powers, and has not attempted to do so, so far as the state normal school is concerned. The governing board of the school is appointed by the governor and confirmed by the senate. No action affecting the normal school, its property, or its endowment, can be prosecuted in the name of the normal school, but such actions are to be prosecuted in the name of the state. (Laws of 1877, ch. 179; Gen. Stat. of 1889, §§ 6358-6361.) The state normal school is under the control of the legislature, and is not a separate or

---

Opinion of the Court.

---

independent corporation. It is a part of the great public school system of the state, and, as a part of that beneficial system, is entitled to the generous support and liberal maintenance of the people. It is unfortunate that the attention of the late legislature was not expressly called to the necessity of a special appropriation, so that the interest on the state normal school fund could be used as the wants and needs of the institution demand. This seems to have been overlooked, and has been overlooked by the state and school authorities for many years. The provisions of the state constitution, however, are now invoked by the attorney general and the state treasurer, both state officials having responsible duties and powers, against the further payment of any order of the board of regents, until an appropriation is passed. We are called upon to say whether the provisions of the constitution, which is the paramount law, forbid further payments. We think they do, and must therefore hold that the interest on this school fund cannot be disbursed by the state treasurer without an appropriation by the legislature. We regret the unfortunate condition in which this decision may temporarily leave the normal school, which has been so successful in its operations, and so beneficial in its influences; but whatever the present consequences may be, we perform a single and unmixed duty in declaring our views upon the matters submitted. We cannot do otherwise. The constitution is the supreme law, and the acts of the state and school officials must be in obedience to its provisions.

The writ prayed for will be denied.

All the Justices concurring.

47	126
49	569
47	126
51	557
47	126
78	437
80	706

## C. M. CONDON V. L. H. KEMPER.

**CONTRACT — Breach — Liquidated Damages — Penalty.** Kemper and Condon entered into a written contract whereby Condon agreed to build a wall, etc., or else at his election to remove a certain house three feet, and put it in as good condition as it was before; and in such contract the parties further stipulated as follows: "It is mutually agreed between said parties that a failure on the part of said Condon to perform these obligations shall entitle said Kemper to recover from him the sum of \$500 as liquidated and ascertained damages for the breach of this contract." Condon elected not to build the wall, etc., and afterward failed to remove the house. The cost of removing the house and putting it in as good condition as it was before would not have exceeded \$100. *Held*, That when the parties made the contract and stipulated for damages in case of breach, fixing the amount at \$500, they could not have had in contemplation actual compensatory damages, and therefore *held*, that the sum of \$500 mentioned in such contract as liquidated and ascertained damages, must be treated as a penalty and not as liquidated damages.

*Error from Labette District Court.*

THIS was an action brought in the district court of Labette county by *L. H. Kemper* against *C. M. Condon*, to recover \$500 as liquidated damages for the alleged breach of the following written contract, to wit:

"This agreement, between *L. H. Kemper* and *C. M. Condon*, witnesseth: That whereas, the said *Kemper* has sold to said *Condon* lot 7, block 38, in Oswego, Kas., said *Condon*, as a part of the consideration therefor, agrees to erect thereon a two-story stone or brick building, not less than 100 feet deep, within six months, and to give use of the north wall thereof to said *Kemper*; or else remove the house now on lot 6, in said block 38, three feet north of where it now stands, as said *Condon* shall elect to do, and put said building in as good condition as it is in its present location. It is mutually agreed between said parties that a failure on the part of said *Condon* to perform these obligations shall entitle said *Kemper* to recover from him the sum of \$500 as liquidated and ascertained damages for the breach of this contract. C. M. CONDON.

"OSWEGO, KAS., March 11, 1887."

---

Statement of the Case.

---

The defendant answered as follows:

"Said defendant admits the execution and delivery of the writing marked 'Exhibit A,' attached to and made part of plaintiff's petition, but he alleges the fact to be that said writing was executed and delivered under a misapprehension and a mistake of the facts in reference to the subject-matter of the transaction therein referred to as they actually existed, and that but for such mistake such writing would not have been executed. Defendant alleges that plaintiff was the owner of lots 6 and 7, in block 38, in the city of Oswego, Kas.; that the frame house mentioned in said writing belonged to plaintiff, and was appurtenant to said lot 6; that defendant negotiated for and purchased from plaintiff said lot 7 with a view of erecting thereon a stone or brick building; that at the time of purchasing said lot 7 and of executing and delivering said writing, both plaintiff and defendant understood and believed that said frame house, mentioned in said writing, and which belonged on and was appurtenant to said lot 6, stood on the line between said lots 6 and 7, the main part of it being, as said parties supposed, on lot 6 and about two or three feet in width of it standing on said lot 7; that to permit defendant to build on his said lot 7 would necessitate the removal of said house, as said parties believed, some three feet to the north; that plaintiff sold and defendant bought said lot under such belief; that plaintiff, in negotiating for the sale of said lot 7, objected to being put to the expense of removing said house so that it would all stand on his own lot 6, or insisted if he were put to such expense he should be compensated therefor, and to this defendant assented, and agreed that he would, at his own expense, remove said frame house so that it should entirely stand on said lot 6, and far enough across the line between said lots 6 and 7 not to interfere with the erection of a wall on said line, and put it in as good condition as it then was where it then stood, or if he should so elect, instead of removing and repairing said house as aforesaid, he might erect on said lot 7 a brick or stone building not less than 100 feet deep and give plaintiff the use of the north wall thereof, as compensation for his moving and repairing said house as aforesaid; that it was to meet such contingency and secure such end that said writing was executed and delivered; that thereafter this defendant elected not to erect said stone or brick building on said lot 7 and not to furnish plaintiff the use of the north wall thereof; that by agreement between said

---

Condon v. Kemper.

---

plaintiff and defendant, said block was afterward surveyed, and the fact was then ascertained that said frame building did not stand, as both of said parties had supposed it did, across the line between said lots 6 and 7, a part on 6 and a part on 7, but that it all then stood on said lot 6 and so far from the line between lots 6 and 7 as not to interfere with the erection of a wall thereon, and therefore a removal of said frame building was unnecessary and would be of no advantage whatever to plaintiff.

"Defendant alleges that the only purpose on the part of plaintiff or defendant in the execution and delivery of said writing was to indemnify plaintiff against cost and expense in the removal and repair of said house as aforesaid, and that had plaintiff desired its removal after the fact in reference to its true location was ascertained, he could have had it removed three feet north of where it then stood, and put in as good condition as it was where it then stood, at a cost and expense of not to exceed \$100; that said house could, at the time of the execution of said writing, or at any time since then, have been removed three feet north of where it then stood and now stands, and put in as good condition as it then was in its then location, at a cost of not to exceed \$100; that in no event could plaintiff's damage, had he desired to have had said house removed, exceed \$100; that to indemnify against such possible damage was the only object in giving said writing. Defendant alleges that plaintiff has not removed said house, and has in no way been to any cost or expense on account of the removal of said house or for any other purpose referred to in any way in said writing. Defendant denies that plaintiff has suffered any damage on his account and denies any liability to him in any respect..

"Wherefore defendant asks that this cause be dismissed and that he recover his costs herein."

The plaintiff replied, denying every allegation of the answer inconsistent with the allegations of his petition. At the February term, 1889, when the case was called for trial, the plaintiff moved for judgment upon the pleadings, and the court sustained the motion and rendered judgment accordingly, in favor of the plaintiff and against the defendant, for \$500, with interest and costs. The defendant excepted, and afterward, as plaintiff in error, brought the case to this court for review.

*Case & Glasse*, for plaintiff in error.

*J. H. Morrison*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: The substantial question involved in this controversy is, whether the plaintiff below, L. H. Kemper, may recover from the defendant below, C. M. Condon, the sum of \$500 as agreed and liquidated damages, or whether he can recover only the amount of his actual loss or damage resulting from the breach of the contract sued on, which amount, according to the facts of the case as presented to us, cannot exceed \$100. The contract upon which Kemper seeks to recover contains the following among other stipulations:

"It is mutually agreed between said parties that a failure on the part of said Condon to perform these obligations shall entitle said Kemper to recover from him the sum of \$500 as liquidated and ascertained damages for the breach of this contract."

It will be seen that the parties themselves have used the words "liquidated and ascertained damages," but nearly all the authorities agree that neither these words nor any other words of similar import are conclusive, but that the amount named, notwithstanding the use of such words, may nevertheless be nothing more than a penalty. Some of such authorities are the following:

*Lampman v. Cochran*, 16 N. Y. 275; *Ayres v. Pease*, 12 Wend. 393; *Hoag v. McGinnis*, 22 id. 163; *Beale v. Hayes*, 5 Sandf. 640; *Gray v. Crosby*, 18 Johns. 219; *Jackson v. Baker*, 2 Edw. Ch. 471; *Shreve v. Brereton*, 51 Pa. St. 175; *Fitzpatrick v. Cottingham*, 14 Wis. 219; *Fisk v. Gray*, 11 Allen, 132; *Wallis v. Carpenter*, 13 id. 19; *Ex parte Pollard*, 2 Low. 411; *Bayse v. Ambrose*, 28 Mo. 39; *Carter v. Strom*, 41 Minn. 522; same case, 43 N. W. Rep. 394; *Schrimpf v. Mfg. Co.* 86 Tenn. 219; *Haldeman v. Jennings*, 14 Ark. 329; *Davis v. Freeman*, 10 Mich. 188; *Hahn v. Horstman*, 12 Bush, 249; *Low v. Nolte*, 16 Ill. 475; *Kemble v. Farren*, 6 Bing.

141; *Davies v. Penton*, 6 Barn. & C. 216; *Horner v. Flintoff*, 9 Mees. & W. 678; *Newman v. Capper*, 4 Ch. Div. 724.

Of course, the words of the parties with respect to damages, losses, penalties, forfeitures, or any sum of money to be paid, received or recovered, must be given due consideration; and, in the absence of anything to the contrary, must be held to have controlling force; but when it may be seen from the entire contract, and the circumstances under which the contract was made, that the parties did not have in contemplation actual damages or actual compensation, and did not attempt to stipulate with reference to the payment or recovery of actual damages or actual compensation, then the amount stipulated to be paid on the one side, or to be received or recovered on the other side, cannot be considered as liquidated damages, but must be considered in the nature of a penalty, and this even if the parties should name such amount "liquidated damages." The following text-books upon this subject may be examined with much profit: 1 Sedg. Dam. (8th ed.), ch. 12, §§ 389-427; 1 Suth. Dam., ch. 7, § 6, pp. 475-530; 13 Am. & Eng. Encyc. of Law, pp. 857-868; 1 Pom. Eq. Jur., §§ 440-447; 3 Pars. Cont., § 2, pp. 156-163. The text-books upon this subject unite in saying that the tendency and preference of the law is to regard a stated sum as a penalty instead of liquidated damages, because actual damages can then be recovered, and the recovery be limited to such damages. (1 Suth. Dam., p. 490; 13 Am. & Eng. Encyc. of Law, pp. 853, 860.) The decisions of this court are also in this same line. The only decisions of this court upon the subject of liquidated damages are the following: *Kurtz v. Sponable*, 6 Kas. 395; *Foote v. Sprague*, 13 id. 155; *St. L. & S. F. R'y. Co. v. Shoemaker*, 27 id. 677; *Heatwole v. Gorrell*, 35 id. 692. We are satisfied with the foregoing decisions of this court, but they do not go to the extent of controlling the decision in the present case. The last case cited is supported by the following additional cases: *Davis v. Gillett*, 52 N. H. 126; *Caswell v. Johnson*, 58 Me. 164; *Burrill v. Daggett*, 77 id. 445.

In 1 Sedgwick on Damages (8th ed.), the following, among other language, is used:

"From the foregoing we derive the following as a general rule governing the whole subject: Whenever the damages were evidently the subject of calculation and adjustment between the parties, and a certain sum was agreed upon and intended as compensation, and is in fact reasonable in amount, it will be allowed by the court as liquidated damages." (Section 405.)

"And here we are brought back by a somewhat circuitous path to the great fundamental principle which underlies our whole system—that of compensation. The great object of this system is to place the plaintiff in as good a position as he would have had if his contract had not been broken. So long as parties themselves keep this principle in view, they will be allowed to agree upon such a sum as will probably be a fair equivalent of a breach of contract. But when they go beyond this, and undertake to stipulate, not for compensation, but for a sum out of all proportion to the measure of liability which the law regards as compensatory, then the law will not allow the agreement to stand. In all agreements, therefore, fixing upon a sum in advance as the measure or limit of liability, the final question is, whether the subject of the contract is such that it violates this fundamental rule of compensation. If it does so, the sum fixed is necessarily a penalty. If it does not do so, the question arises, as in any other contract, as to what agreement the parties have actually made, and here, as in all other cases, their intention, as ascertained from the language employed, is a guide." (Section 406.)

"Where the stipulated sum is wholly collateral to the object of the contract, being evidently inserted merely as security for performance, it will not be allowed as liquidated damages." (Section 410.)

"Whenever an amount stipulated is to be paid on the non-payment of a less amount, or on default in delivering a thing of less value, the sum will generally be treated as a penalty." (Section 411.)

"Whenever the stipulated sum is to be paid on breach of a contract of such a nature that the loss may be much greater or much less than the sum, it will not be allowed as liquidated damages." (Section 412.)

"A sum fixed as security for the performance of a contract containing a number of stipulations of widely different im-



portance, breaches of some of which are capable of accurate valuation, for any of which the stipulated sum is an excessive compensation, is a penalty." (Section 413.)

"If the contract is one in which the measure of damages for part performance is ascertainable, and a sum is stipulated for breach of it, this sum will not be allowed as liquidated damages in case of a partial breach." (Section 415.)

In 1 Pomeroy on Equity Jurisprudence, the following language is used :

"Where an agreement contains provisions for the performance or non-performance of several acts of different degrees of importance, and then a certain sum is stipulated to be paid upon a violation of any or all of such provisions, and the sum will be in some instances too large, and in others too small a compensation for the injury thereby occasioned, that sum is to be treated as a penalty and not as liquidated damages. This rule has been laid down in a somewhat different form, as follows: Where the agreement contains provisions for the performance or non-performance of acts which are not measurable by any exact pecuniary standard, and also of one or more other acts in respect of which the damages are easily ascertainable by a jury, and a certain sum is stipulated to be paid upon a violation of any or of all these provisions, such sum must be taken to be a penalty." (Section 443.)

"Whether an agreement provides for the performance or non-performance of one single act, or of several distinct and separate acts, if the stipulation to pay a certain sum of money upon a default is so framed, is of such a nature and effect that it necessarily renders the defaulting party liable in the same amount at all events, both when his failure to perform is complete and when it is only partial, the sum must be regarded as a penalty and not as liquidated damages." (Section 444.)

In 1 Sutherland on Damages, the following, among other language, is used :

"While no one can fail to discover a very great amount of apparent conflict, still it will be found on examination that most of the cases, however conflicting in appearance, have yet been decided according to the justice and equity of the particular case." (Page 478.)

"To be potential and controlling that a stated sum is liquidated damage, that sum must be fixed as the basis of compen-

## Opinion of the Court.

sation and substantially limited to it; for just compensation is recognized as the universal measure of damages not punitive. Parties may liquidate the amount by previous agreement. But when a stipulated sum is evidently not based on that principle, the intention to liquidate damages will either be found not to exist, or will be disregarded, and the stated sum treated as a penalty. Contracts are not made to be broken; and hence, when parties provide for consequences of a breach, they proceed with less caution than if that event was certain, and they were fixing a sum absolutely to be paid. The intention in all such cases is material; but to prevent a stated sum from being treated as a penalty, the intention should be apparent to liquidate damages in the sense of making just compensation; it is not enough that the parties express the intention that the stated sum shall be paid in case of a violation of the contract. A penalty is not converted into liquidated damages by the intention that it be paid; it is intrinsically a different thing, and the intention that it be paid cannot alter its nature. A bond, literally construed, imports an intention that the penalty shall be paid if there be default in the performance of the condition; and formerly that was the legal effect. Courts of law, now, however, administer the same equity to relieve from penalties in other forms of contract as from those in bonds. The evidence of an intention to measure the damage, therefore, is seldom satisfactory when the amount stated varies materially from a just estimate of the actual loss finally sustained." (Pages 480, 481.)

See also, especially, 3 Parsons on Contracts (16th ed.), page 156, *et seq.*

Many courts hold that the intention of the parties must govern, but say that if the damages stipulated to be paid, received or recovered on the breach of the contract are out of proportion to the actual damages that might be sustained, then that the parties could not in fact have intended liquidated damages but merely a penalty, whatever their language might be. Other courts hold that it makes no difference what the intention of the parties might be; that the nature of the contract itself must govern; and if the amount stipulated to be paid, received or recovered is out of all proportion to the actual damages that might be sustained, then that such amount must

---

Condon v. Kemper.

---

be treated as a penalty, whatever may have been the intention of the parties; that in fact, and in the very nature of things, such amount would be a penalty, and could not be anything else; that the parties could not by misnaming the amount and calling it liquidated damages make it such. In this connection, the following language of Judge Christiancy, who delivered the opinion of the court in the case of *Jaquith v. Hudson*, 5 Mich. 123, 136, 137, is instructive:

"Again, the attempt to place this question upon the intention of the parties, and to make this the governing consideration, necessarily implies that, if the intention to make the sum stipulated damages should clearly appear, the court would enforce the contract according to that intention. To test this, let it be asked whether, in such a case, if it were *admitted* that the parties actually *intended* the sum to be considered as *stipulated damages*, and *not* as a penalty, would a court of law enforce it for the amount stipulated? Clearly, they could not, without going back to the technical and long-exploded doctrine which gave the whole penalty of the bond, without reference to the damages actually sustained. They would thus be simply changing the names of things, and enforcing, *under the name of stipulated damages*, what in its *own* nature is but a *penalty*. The real question in this class of cases will be found to be, not what the party *intended*, but whether the sum is, *in fact, in the nature* of a penalty; and this is to be determined by the magnitude of the sum, in connection with the subject-matter, and not at all by the words or the understanding of the parties. The intention of the parties cannot alter it. While courts of law gave the penalty of the bond, the parties intended the payment of the penalty as much as they now intend the payment of stipulated damages; it must, therefore, we think, be very obvious that the actual intention of the parties, in this class of cases, and relating to this point, is wholly immaterial; and though the courts have very generally professed to base their decisions upon the intention of the parties, that intention *is not, and cannot be, made the real basis of these decisions*. In endeavoring to reconcile their decisions with the actual intention of the parties, the courts have sometimes been compelled to use language wholly at war with any idea of interpretation, and to say 'that the parties must be considered as not meaning exactly what they say.' (*Horner v. Flint-*

## Opinion of the Court.

off, 9 Mees. & W. 678, per Parke, B.) May it not be said, with at least equal propriety, that the courts have sometimes said what they did not *exactly* mean?"

And in the case of *Myer v. Hart*, 40 Mich. 517, 523, the supreme court of Michigan held as follows:

"Just compensation for the injury sustained is the principle at which the law aims, and the parties will not be permitted, by express stipulation, to set this principle aside."

We might quote further from the text-books and the reported cases, but we think the foregoing is sufficient; and from the foregoing it certainly follows that the plaintiff below, Kemper, cannot "recover" "the sum of \$500 as liquidated and ascertained damages for the breach of this contract," notwithstanding such is the language of the contract. If the defendant, Condon, had removed the building situated on lot 6 three feet north, and had then put the same in as good condition as it was before, he would have so completed his contract that not one cent of damage could be recovered from him; and to so remove such building and to put it in as good condition as it was before would not have cost to exceed \$100. But suppose that Condon had removed the building, and then had failed to put the same in as good condition as it was before: he would have committed a breach of the contract, but the actual damages might not have been \$25. Then should the plaintiff, Kemper, recover the said sum of \$500? Or suppose that Condon had removed the house and attempted to put it in as good condition as it was before, but had failed to repair a lock or a small portion of the plastering, or a broken window, which repairing might not have cost \$1: then should Kemper have the right to recover the said sum of \$500? All this shows that the parties did not have in con-

Contract—  
breach—liquidated damages  
—penalty.

templation the matter of actual compensatory damages when they stipulated that Kemper might recover \$500 from Condon as liquidated and ascertained damages in case of a breach of the contract, but shows that in fact, though not in words, they fixed the sum of \$500

as a penalty to cover all or any damages which might result from a breach of the contract.

The judgment of the court below will be reversed, and the cause remanded for further proceedings.

All the Justices concurring.

### THE STATE OF KANSAS V. WILLIAM COMBS.

47	136
66	449
47	136
70	859

**EMBEZZLEMENT—*Sufficient Information.*** An information for embezzlement under § 90 of the crimes act charged that "one A. M. Fearn did intrust to William Combs, for safe custody, \$530, current money of the United States, of the value of \$530, he, the said William Combs, receiving and accepting the same as the bailee of said A. M. Fearn; that said \$530 consisted of United States national bills, commonly called greenbacks, and national bank bills, silver certificates, and gold certificates. The denominations and names of each are unknown to said A. M. Fearn, the prosecuting witness, or your informant, but they all pass as current money of the United States, and all were of the value of \$530. That after the said William Combs received said current money, as aforesaid, as such bailee, and on said 10th day of March, 1891, at the county of Harvey, in the state of Kansas, did then and there unlawfully and feloniously embezzle and convert to his own use, and make way with and secrete said \$530, current money of the United States, and of the value of \$530, belonging to and being then and there the money and property of said A. M. Fearn, without the authority, knowledge or consent of said A. M. Fearn; and then and there, in the manner aforesaid, the said money, the property of said A. M. Fearn, did unlawfully and feloniously steal, take, and carry away." Upon a motion in arrest of judgment, it was objected that the information did not specify the nature of the bailment; that it did not contain an allegation of intent; and that it did not describe the money alleged to have been embezzled with a reasonable degree of certainty. *Held*, That the information is not fatally defective upon any of the grounds mentioned, and that its allegations are sufficient to resist objections which were not made until after trial and verdict.

*Appeal from Harvey District Court.*

PROSECUTION for embezzlement. From a conviction at the May term, 1891, the defendant, *Combs*, appeals. The facts sufficiently appear in the opinion.

*J. B. Crouch*, and *Madden Bros.*, for appellant.

*John N. Ives*, attorney general, and *C. S. Bowman*, county attorney, for The State.

The opinion of the court was delivered by

JOHNSTON, J.: This was a prosecution for embezzlement, under § 90 of the crimes act. The defendant was convicted, and the judgment of the court was, that he should be confined at hard labor for a term of two years in the state penitentiary. The information under which he was convicted charged as follows:

"That on the 10th day of March, 1891, in said county of Harvey and state of Kansas, one A. M. Fearn did intrust to William Combs, for safe custody, \$530, current money of the United States, of the value of \$530, he, the said William Combs, receiving and accepting the same as the bailee of said A. M. Fearn; that said \$530 consisted of United States national bills, commonly called greenbacks, and national bank bills, silver certificates, and gold certificates. The denominations and names of each are unknown to said A. M. Fearn, the prosecuting witness, or your informant, but they all pass as current money of the United States, and all were of the value of \$530. That after the said William Combs received said current money, as aforesaid, as such bailee, and on said 10th day of March, 1891, at the county of Harvey, in the state of Kansas, did then and there unlawfully and feloniously embezzle and convert to his own use, and make way with and secrete said \$530, current money of the United States, and of the value of \$530, belonging to and being then and there the money and property of said A. M. Fearn, without the authority, knowledge or consent of said A. M. Fearn, and then and there, in the manner aforesaid, the said money, the property of the said A. M. Fearn, did unlawfully and feloniously steal, take, and carry away, contrary to the form of the

statute in such cases made and provided, and against the peace and dignity of the state of Kansas."

After the verdict, the defendant moved to arrest the judgment, upon the ground that the facts stated in the information did not constitute a public offense. This motion was denied, but the defendant still insists that the information was fatally defective, and on that ground he asks a reversal. Three objections are urged against the information: (1) That it does not specify the nature of the bailment; (2) that it contains no allegation of intent; and (3) that it does not describe the money alleged to have been embezzled with a reasonable degree of certainty.

It is to be observed that the sufficiency of the information was not raised by a motion to quash, nor until after trial and verdict, when the motion in arrest of judgment was interposed. "It was then too late to avail himself of technical error in form or mere imperfection in the statement of the complaint. Defects in a criminal pleading which might be held bad on a motion to quash, if one was made, are not always sufficient after a verdict of guilty to arrest a judgment." (*City of Kingman v. Berry*, 40 Kas. 625; *The State v. Knowles*, 34 id. 393; *The State v. Ratner*, 44 id. 429.) Although the charge does not fully state the facts and circumstances of the bailment, it fairly indicates the character of the same. It shows who placed the money in his hands, the purpose for which it was intrusted to him, and wherein he has failed to carry out the trust. It fairly states that the money was intrusted to him by Fearn for safe custody, but that, instead of safely keeping the money, he embezzled and converted the same to his own use, and did feloniously steal and carry it away.

We are referred to *The State v. Griffith*, 45 Kas. 142, as sustaining the objection to this information. The sufficiency of the information in that case, however, was raised early in the prosecution by a motion to quash, and, unlike the charge in the present case, the information there failed to allege the name of the person from whom the property was received, the purpose for which it was placed in defendant's hands, or the

---

Opinion of the Court.

---

conditions upon which he was expected to hold, dispose of, or return it. It was there decided that the defendant was entitled to be informed of the object of the trust, as claimed by the prosecution, and wherein he had failed to conform to that object. That has been sufficiently done in the charge under consideration to resist a motion in arrest of judgment.

The second objection, that the information contains no allegation of intent, cannot be sustained. The charge as stated includes the evil intent of wrongfully appropriating money entrusted to him by Fearn for a specific purpose to his own use, and sufficiently characterizes the intent with which the offense was committed. (*The State v. Smith*, 38 Kas. 194.) It was hardly necessary to allege that the money was embezzled and converted with the intention to embezzle and convert the same. It is difficult to conceive how he could have honestly and innocently embezzled and stolen the money entrusted to him.

The last objection is that the money is not described with sufficient certainty. It is described as "\$530 current money of the United States, of the value of \$530," . . . "consisting of United States national bills, commonly called greenbacks, and national bank bills, silver certificates, and gold certificates." This description is coupled with an allegation of inability to give the denomination and number of each, or a better description of the money embezzled and stolen. With this excuse for the failure to give a more definite description, the information cannot be held fatally defective, and especially when the objection is not made until after a verdict has been returned. (*The State v. Henry*, 24 Kas. 457; *The State v. McAnulty*, 26 id. 533; *The State v. Tilney*, 38 id. 714.)

The judgment of the district court will be affirmed.

All the Justices concurring.



## THE STATE OF KANSAS V. D. C. McLAFFERTY.

1. **INFORMATION**—*Description of Defendant.* Held, Under the corrected record in this case, that the defendant was properly described in the count of the information upon which he was convicted.
2. **INSTRUCTIONS, Not Misleading.** Certain instructions considered, and held not to be misleading or erroneous, when considered with the entire charge to the jury.
3. **ORAL STATEMENTS by Court to Jury—New Trial Denied.** The mere fact that the court made certain oral statements to the jury in relation to their agreeing upon a verdict, after they had retired to consider their verdict and had been returned into court, but did not direct them upon any rule of law involved in the trial, or make any comment upon the testimony, is not such an instruction as is required to be in writing, in accordance with § 236 of the criminal code; and while such statements may be subject to criticism, and ought not to have been made to the jury, still they are not considered sufficiently prejudicial to grant a new trial in a case where, from the entire record, the guilt of the defendant clearly appears.

*Appeal from Shawnee District Court.*

PROSECUTION for the unlawful sale of intoxicating liquor. From a conviction at the April term, 1891, the defendant, *McLafferty*, appeals.

*A. H. Case*, for appellant.

*John N. Ives*, attorney general, and *R. B. Welch*, county attorney, for The State.

Opinion by GREEN, C.: The defendant was tried in the district court of Shawnee county on an information containing three counts, wherein he was charged with the unlawful sale of intoxicating liquors. He was convicted only upon the first count. It is urged that the district court should have sustained a motion for a new trial, for the reason that in the first count of the information the title to the cause was: "The State of Kansas against D. C. McLafferty," while in the body of the information, the defendant was described as "D. C. Lafferty." This objection has been removed by the sugges-

tion of a diminution of the record, by the county attorney, and a correction of the bill of exceptions, which shows that the defendant's name was the same in the first count in the information as in the title of the action.

The appellant objects to the sixth and eighth instructions, and the claim is made that they are erroneous and misleading. The court instructed the jury that proof of a sale of what is generally and popularly known as brandy, wine, lager beer or gin is proof of a sale of intoxicating liquors, within the meaning of the law, and that it was not necessary, in the first instance, for the prosecution to offer evidence of that fact, but that such liquors are presumed to be intoxicating until the contrary is proven. The information charged the sale of all kinds of intoxicants, and, while most of the evidence was to the effect that the defendant sold what was called hard cider, still it was claimed, upon the part of the defendant, that the parties drank some kind of a mixture which they had compounded themselves. This instruction did not prejudice the rights of the defendant.

The court further instructed the jury, that if they should find from the evidence, beyond a reasonable doubt, that the defendant sold, bartered, or gave away, to the persons named in the information, whisky, brandy, wine, beer, gin, or hard cider, or mixtures thereof, and that such persons were minors, it was wholly immaterial whether the defendant had or had not a permit as a druggist. It was clearly established that the defendant did not have a permit. While this evidence was not necessary, in the first instance, the defendant was not prejudiced by it or the instruction. Upon the question of hard cider being intoxicating, this court has held that—

“Hard cider is cider excessively fermented; and therefore, presumptively, hard cider is not only a fermented liquor, but intoxicating. Whatever is generally and popularly known as intoxicating liquor may be so declared as a matter of law, by the courts. Under the statute, all fermented liquor is presumed to be intoxicating; and if the defendant denies that the fermented liquor sold by him is intoxicating, it devolves

upon him to remove the presumption of law, by evidence." (*The State v. Volmer*, 6 Kas. 371; *Intoxicating Liquor Cases*, 25 id. 751; *The State v. Schaefer*, 44 id. 90.)

We think this instruction was not misleading or erroneous, when considered with the charge to the jury, as an entirety.

It is next urged that the court erred in making an oral statement to the jury, after they had retired to consider their verdict, and had been returned into court. While this oral statement made to the jury may be subject to just criticism, it can hardly be said to be an instruction, in the sense in which that word is used in § 236 of the criminal code.

"The mere fact that an oral communication has passed from the court to the jury is not of itself proof that the statute has been disregarded. The court may properly make oral statements to the jury in reference to the form of the verdict, the manner in which the trial has been conducted, the behavior of the jury or counsel or parties, or any other oral statement which is not fairly and strictly a direction or instruction upon some question or rule of law involved in or applicable to the trial, or a comment upon the evidence." (*The State v. Potter*, 15 Kas. 304.)

The record in this case shows conclusively that the defendant was guilty of selling hard cider to three minors, two of whom were under the age of 14 years, and that each one of them became intoxicated from drinking this cider; and it does not show such prejudicial error as to entitle the defendant to a new trial.

The judgment of conviction should be affirmed.

By the Court: It is so ordered.

All the Justices concurring.

## THE STATE OF KANSAS V. MARY McLAUGHLIN.

1. **INFORMATION** — *Joinder of Counts.* A count for maintaining a nuisance, under § 13 of the prohibitory law, may be joined in an information with one or more counts charging illegal sales of intoxicating liquors, under § 7 of the same law.
2. ——— The record examined, and *held*, that no substantial error exists therein.

*Appeal from Geary District Court.*

THE facts are sufficiently stated in the opinion.

*Dever & Starnes*, for appellant.

*John N. Ives*, attorney general, and *James V. Humphrey*, county attorney, for The State.

Opinion by STRANG, C.: The information in this case charged Sim Irvine and Mary McLaughlin with the unlawful sale of intoxicating liquors, in three separate counts, and with keeping and maintaining a nuisance, in a fourth count. The defendant Mary McLaughlin demanded a separate trial, which was allowed, and the case is brought here as to her alone. The defendant moved that the fourth count be stricken out of the information. This motion was overruled, and the case went to trial on all four counts of the information. The defendant was acquitted on the first count and convicted on the other three. She moved for a new trial, which motion was overruled, and she brought the case to this court, and asks that the judgment of the court below be reversed for the following reasons:

I. The defendant alleges that it was error for the court to permit the joinder of the fourth count of the information, which charges the offense of maintaining a nuisance, with the other counts thereof, each of which charges the offense of illegally selling intoxicating liquors. Each of the counts in the information charges a misdemeanor, and each of the misdemeanors charged is of a kindred nature and grew out of vio-

---

The State v. McLaughlin.

---

lations of different sections of the same statute, relating to the same subject-matter, and, whether tried jointly or separately, must be tried in the same way, and largely upon the same evidence. We know of no reason, therefore, why they should not be joined, but on the other hand, think, because they must largely depend upon the same evidence in the trial thereof, that it is not only allowable to join them in the same information, but quite proper to do so. The reason assigned by the defense against the joinder of the fourth with the other counts in the information is, that the defendant is put at a disadvantage by such joinder in this, that the evidence introduced is used to convict the defendant of two separate and distinct offenses at the same time. It is true that evidence introduced for the purpose of proving the charges in the counts alleging illegal sales may at the same time be competent to prove, and be relied upon to establish, the allegations contained in the fourth count, which charges the maintenance of a nuisance. But we see no disadvantage in this to the defendant, since, if the counts charging illegal sales and the one charging the maintenance of a nuisance were separated, and the nuisance count was tried by itself, the same evidence used to prove the charges of illegal sales, in the trial of the case on the information containing the counts alleging such sales, could and would be resorted to for the purpose of sustaining the charge of maintaining a nuisance, on the trial of the case on the information containing such charge. The result, therefore, would be two formal trials, when one would secure the same purpose.

The defense also insists that there is nothing in the affidavits of witnesses filed with the information to justify a warrant for the arrest of the defendant upon the charge of maintaining a nuisance, and as the information is sworn to by the county attorney upon information and belief only, there is no foundation for the prosecution of the defendant on the fourth count, and the motion to strike it from the information should have prevailed. The affidavits do not specifically charge the maintenance of a nuisance, but they contain allegations of all the elements necessary to the offense of maintaining a nuisance.

## Opinion of the Court.

They show the keeping and sale of liquor at a certain place in violation of law, and allege that the place is kept by the defendant and Sim Irvine. We think the evidence filed by the county attorney with the information sufficient, together with the oath of the county attorney, to justify the warrant on the charge contained in the fourth count of the information.

II. The second alleged error of the trial court consists in the reception thereby of evidence, over the objections of the defendant. We think these objections were based upon an imperfect comprehension of the scope of the evidence filed with the information. This evidence is very broad, and an examination thereof, together with the evidence objected to, satisfies us that there is no substantial error in the ruling of the trial court in relation thereto. The defendant objects to the sixth instruction, and says it is not warranted by the testimony of Scully filed with the information, nor by his evidence on the trial of the case; that it does not appear that he purchased or obtained any liquor from the defendant on the 15th of February, 1891. It is true his statement filed with the information, and his evidence on the trial, shows that he got the liquor of Sim Irvine. But the statements filed with the information show that Sim Irvine and the defendant *together* kept the place where the liquor was obtained, and the evidence on the trial of the case conclusively shows not only that the business carried on at the place described in each of the counts of the information, and in the evidence filed therewith, was the *joint* business of the defendant and Sim Irvine, but that they were *jointly* concerned in the *conduct* thereof. Sales were made by each in the presence as well as in the absence of the other. It being true, as the evidence conclusively shows, that the defendant owned the place where the business was carried on, and had a joint interest with Sim Irvine in the liquors kept and sold, and *personally* joined in the sale thereof, she not only approved and ratified all the sales made by Irvine, but was equally responsible under the law with him for the sales made by him. It follows, therefore, that she was

responsible for the sales by Irvine to Scully, and the evidence of such sales was properly admitted to establish the charge against her, and the sixth instruction was supported by the evidence, and the defendant was properly convicted on the third count.

We do not think there is any substantial error in the eighth instruction. The first clause of the eleventh instruction as an abstract statement of the law is incomplete, but, when considered in the light of the evidence in the case, we do not think this part of the instruction contains any material error. The jury could not have been misled to the injury of the defendant, because, as above stated, the evidence conclusively shows that the defendant not only had a *joint* interest in the liquors sold, but that such liquors were sold *indiscriminately* by herself and Irvine for the benefit of *both*, and therefore sales made by Irvine were authorized by her, which rendered her equally responsible with him for such sales. There is no error in the last clause of the eleventh instruction.

We do not think the first instruction asked by the defendant properly states the law. We think the same evidence may, at the same time, on the same trial, be introduced and considered by the jury, for the purpose of establishing the illegal sales charged in the first, second and third counts of the information, and also for the purpose of proving the charge contained in the fourth count thereof.

We do not think the second instruction asked by the defendant properly states the law, because we believe the proof of *continued* sales of intoxicating liquor in violation of law by one or more persons, on his or their premises, kept by him or them, is *sufficient* to establish the fact that intoxicating liquors were kept on the premises for unlawful purposes.

It is recommended that the judgment of the district court be affirmed.

By the Court: It is so ordered.

All the Justices concurring.

THE STATE OF KANSAS, *on the relation of John N. Ives, Attorney General, v. WILLIAM MARTINDALE et al., as Directors of the State Penitentiary, et al.*

47	147
47	181
47	147
480	106

47	147
478	588

**EIGHT-HOUR LAW—Officers and Employés in Penitentiary.** The officers and employés mentioned in §20, chapter 152, Laws of 1891, are not embraced in the provisions of chapter 114, Laws of 1891, making it unlawful for laborers, workmen, mechanics, or other persons, employed by the state of Kansas, to work more than eight hours a day.

*Original Proceeding in Mandamus.*

APPLICATION for a writ of *mandamus* to compel the directors and warden of the state penitentiary to comply with the eight-hour law. The material facts are stated in the opinion, filed October 10, 1891.

*John N. Ives*, attorney general, and *John Martin*, for plaintiff.

*L. B. Kellogg*, for defendants.

The opinion of the court was delivered by

HORTON, C. J.: This is an original proceeding in this court, brought by the state upon the relation of the attorney general, against the directors and warden of the state penitentiary, praying that they be compelled to comply with the provisions of chapter 114 of the Session Laws of 1891, commonly called "the eight-hour law," in the employment and control of officers and employés working in the state penitentiary. It appears from the stipulation of the parties that several of the officers and other employés in the penitentiary are required and permitted to work more than eight hours per day. On the part of the plaintiff, it is alleged that this is in violation of the provisions of said chapter 114. Section 1 of the chapter reads:

"That eight hours shall constitute a day's work for all laborers, workmen, mechanics, or other persons, now employed, or who may hereafter be employed by or on behalf of the state



---

The State, *ex rel.*, v. Martindale.

---

of Kansas, or by or on behalf of any county, city, township, or other municipality of said state, except in cases of extraordinary emergency which may arise in time of war, or in cases where it may be necessary to work more than eight hours per calendar day for the protection of property or human life: *Provided*, That in all such cases the laborer, workmen, mechanics, or other persons so employed and working to exceed eight hours per calendar day, shall be paid on the basis of eight hours constituting a day's work: *Provided further*, That not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers, workmen, mechanics, and other persons so employed by or on behalf of the state of Kansas, or any county, city, township, or other municipality of said state; and laborers, workmen, mechanics and other persons employed by contractors or subcontractors in the execution of any contract or contracts within the state of Kansas, or within any county, city, township, or other municipality thereof, shall be deemed to be employed by or on behalf of the state of Kansas, or of such county, city, township, or other municipality thereof."

Section 2 of the chapter provides, among other things, that—

"It shall be unlawful for any such corporation, person or persons to require or permit any laborer, workman, mechanic or other person to work more than eight hours per calendar day in doing such work, or in furnishing or manufacturing such material, except in the cases and upon the conditions provided in section 1 of this act."

Section 3 further provides, that any person guilty of violating any of the provisions of said act may be punished for each offense "by a fine not less than \$50, nor more than \$1,000, or by imprisonment not more than six months, or by both a fine and imprisonment."

Conceding, for the purposes of this case, that chapter 114 is constitutional, the question arises, whether its provisions apply to any officer or employé mentioned in the act of 1891 relating to the penitentiary. Chapter 114 was approved March 10, 1891. It took effect from and after its publication in the statute book. This was on the 20th of May, 1891. Chapter 152, Laws of 1891, being the act relating to the state penitentiary, was approved March 11, 1891, but took effect

---

Opinion of the Court.

---

from and after June 30, 1891. Section 20, of chapter 152, reads:

"There shall be paid to the officers of the penitentiary the following annual salaries, to wit: To the warden, \$2,500; the deputy warden, \$1,200; the clerk, \$1,200; assistant clerk, \$720; physician, \$1,400; chaplain, \$1,000; storekeeper, \$720; engineer, \$1,200; first assistant engineer, \$900; second assistant engineer, \$720; turnkey, \$720; first assistant turnkey, \$600; second assistant turnkey, \$600; superintendent clothing department, \$600; messenger, \$600; steward, \$600; yardmaster, \$600; superintendent of building, \$720; superintendent of masonry, \$720; matron, \$500; assistant matron, \$400; 36 keepers, \$600 each, \$21,600; 11 night watchmen at \$600 each, \$6,600; farmer and gardener, \$600; insane ward keeper, \$600; superintendent of mines, \$2,000; engineer of mine, \$1,000; assistant engineer of mine, \$900; weigh clerk, \$800; shipping clerk, \$800; pit boss, \$820; top officer, \$720; bottom officer, \$720; two fire bosses at \$720 each, \$1,440; 14 mine-keepers at \$700 each, \$9,800."

It is now insisted upon the part of the state that the officers and employes referred to in § 20 cannot be required or permitted by the directors or warden of the penitentiary to work more than eight hours per day. We do not agree with this conclusion. Chapter 152 is the latest expression of the legislature. Section 1 of chapter 114, the earlier law, provides, among other things, that "not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers, workmen, mechanics, and other persons so employed by or on behalf of the state of Kansas, or any county, city, township, or other municipality of said state." Considering the provisions of § 20, in chapter 152, this provision in § 1 of chapter 114 cannot be carried out as to the persons named in § 20, if force is given to all the provisions of chapter 152, and especially if force is given to the provisions of §§ 20 and 39. The last section provides that a day's labor of a convict shall be 10 hours; and the statute also provides that the board of directors or warden shall furnish guards to look after the convicts while they are at work. Of course, by shifts of guards, convicts could be compelled to

work 10 hours a day, and the guards eight only; but it is quite probable, if the legislature intended that the employés in the penitentiary should work only eight hours a day, that a like limitation would have controlled the day's labor of a convict. While the convicts in the penitentiary are sentenced to compulsory labor, the rule has been to require them to work only the same hours per day as other laborers. There are many provisions in said chapter 152 which cannot be carried into effect in the penitentiary if full force is given to the provisions of chapter 114. It seems to us clear that it was not the intention of the legislature that chapter 114, Laws of 1891, should have any application to the officers or employés of the penitentiary mentioned in § 20 of chapter 152. Those officers and employés are given annual salaries, the amount for each officer and employé is specifically stated, and the amounts have been appropriated by the legislature without specific reference to the current rate of per diem wages in the locality where the work is to be performed. Then, again, the officers and employés mentioned in said § 20 of chapter 152 are paid annual salaries, and not per diem wages for each day. The words "laborers, workmen, mechanics, or other persons," in § 1 of chapter 114, evidently do not embrace any officer or employé for whom an annual salary has been specifically named and appropriated by the legislature.

Further, chapter 114 is a penal statute, and must therefore be strictly construed. It cannot be extended by construction. Unless it necessarily includes the officers or employés mentioned in § 20 of chapter 152, or some one of them, it cannot apply to any officer or employé. We think it has no application to any officer or employé named therein. If the provisions of chapter 114 were applied by the defendants to the penitentiary, then the appropriations of 1891 for that institution are wholly insufficient, and it is hardly possible that the legislature intended to leave it in a crippled condition. It was urged upon the argument on behalf of the state, that if chapter 114 had no application to the officers or employés in the penitentiary, or in the charitable institutions of the state, its

---

The State v. Woodruff.

---

provisions would scarcely have any operation. This is not correct, because, if the statute is constitutional, it will apply to laborers, workmen, mechanics, or other persons employed by or on behalf of the state, in many cases outside of the penitentiary and the charitable institutions, and also to many of the employés of counties, cities and townships of the state. (Section 1.)

A peremptory writ of *mandamus* will be denied, and the defendants will recover their costs.

All the Justices concurring.

---

THE STATE OF KANSAS, on the relation of John N. Ives, Attorney General, v. L. K. KIRK *et al.*, as Trustees of the State Charitable Institutions, and B. D. Eastman, as Superintendent of the Topeka Insane Asylum.

*Per Curiam*: Upon the authority of *The State, ex rel., v. Martindale et al.*, just decided, the peremptory writ of *mandamus* will also be denied in this case, and judgment rendered in favor of the defendants for their costs. •

---

47b 151  
55 166

THE STATE OF KANSAS V. FRANK WOODRUFF.

1. LARCENY—*Sufficient Taking and Carrying Away.* Where a person obtains possession of a horse with the consent of the owner, by falsely and fraudulently pretending that he wants to use him a short time for a temporary purpose, and will return him to the owner at a specified time, when in fact he intends to and does wholly deprive the owner of the horse and appropriates him to his own use, there is such a taking and carrying away as to constitute the offense of grand larceny.

---

The State v. Woodruff.

---

2. ——— *Immaterial Evidence.* The admission of improper and immaterial evidence, not prejudicial to the complaining party, is not a ground of reversal.

*Appeal from Johnson District Court.*

PROSECUTION for grand larceny. From a conviction, on May 15, 1891, the defendant, *Woodruff*, appeals. The opinion states the facts.

*F. R. Ogg*, for appellant.

*S. D. Scott*, county attorney, for The State.

The opinion of the court was delivered by

JOHNSTON, J.: Frank Woodruff was convicted of grand larceny. The information was filed in December, 1890, and charged Woodruff with stealing a roan mare, the property of F. F. Murray, on August 9, 1887, and alleged that since about the time the larceny was committed Woodruff had been a fugitive from justice and absent from the state. At the trial, testimony was given that Woodruff came to the house of J. C. Murray in the latter part of July, 1887, and was employed by Murray to work upon his farm. On the morning of August 9, 1887, he was sent into a field to cut corn for J. C. Murray, but instead of doing so he went to the home of F. F. Murray, who was a son of J. C. Murray, and told him that he had the toothache and desired to go to Olathe to have the tooth extracted, and he said that he wanted to hire a horse to ride to Olathe, stating that he would return the animal about noon of that day. Murray consented, and assisted in saddling and bridling the mare, but he never saw the mare afterward, and never saw the defendant until the fall of 1890, when he was brought from Illinois upon requisition of the governor of the state. When the defendant did not return at noon with the mare, Murray went to Olathe, and with the aid of the sheriff made a fruitless search for Woodruff and the mare. He was not seen at Olathe on that day, but was seen by one witness in possession of the mare at the town of Morse, Kansas. The mare has never been found or recovered.

---

Opinion of the Court.

---

The defendant insisted that under these facts there was no such trespass and taking as was necessary to constitute the offense of larceny; and he asked the court to charge the jury that if he obtained the possession of the mare with the consent of the owner, and afterward appropriated her to his own use, he could not be convicted of larceny. The court instructed the jury as follows:

"If you believe from the evidence that defendant obtained possession of the mare charged in the information to have been stolen under the pretense that he wanted to ride to Olathe, but in reality with intent to convert her to his own use, and to deprive the owner of his property, that would be a sufficient taking and carrying away to constitute the crime of grand larceny."

Further along in the charge the court instructed that—

"If you are satisfied from the evidence beyond a reasonable doubt that the owner of the mare alleged to have been stolen intended only to part with the possession of the mare, and not with the ownership, and that the defendant took possession of the mare not for the purpose, as he stated, of riding to Olathe and return, but with intent to convert the mare to his own use and to deprive the owner of his property therein, and that in pursuance of such intent he did convert the mare to his own use, then you ought to find the defendant guilty of grand larceny, as charged in the information."

The instructions given by the court were warranted by the evidence, and correctly stated the law of the case. To constitute larceny there must be an intentional taking, without the consent of the owner—an intentional fraud and appropriation of the property to the use of the defendant. If the owner consents to part with the property there can be no larceny; but the consent must be free and voluntary. Where his consent to surrender possession for some temporary and legitimate purpose is obtained by a trick or a fraud, and the taker intends to deprive the owner of his property and convert the same to his own use, the consent is a nullity, out of which no legal possession or right of possession against the owner can arise. According to the testimony on which the verdict in

---

The State v. Woodruff.

---

this case rests, there was no voluntary surrender of the possession of the property for the purposes intended by the defendant; hence the taking was tortious and against the will of the owner. The jury were warranted in inferring that the defendant never intended to go to Olathe for the purpose of having a tooth extracted, and never intended to return the mare to the owner, but that his real purpose was to steal the mare and convert her to his own use. According to the testimony, he never went to Olathe, never returned the mare, and it appears that he fled from Kansas and took refuge in the state of Illinois, remaining there until he was found and extradited for the commission of this offense. We think that the evidence is sufficient to sustain the verdict, and that the defendant has no cause to complain of the charge of the court. (*The State v. Williams*, 35 Mo. 229; *The State v. Coombs*, 55 Me. 477; *The State v. Humphrey*, 32 Vt. 571; *People v. Shaw*, 57 Mich. 403; *People v. Smallman*, 55 Cal. 185; *Smith v. People*, 53 N. Y. 111; *Miller v. Commonwealth*, 78 Ky. 15; *People v. Smith*, 23 Cal. 280; *English v. The State*, 15 S. W. Rep. 649; *The State v. Anderson*, 25 Minn. 66; 12 Am. & Eng. Encyc. of Law, 770.)

The introduction in evidence of a postal-card notice given by the sheriff, offering a reward for the stolen mare, giving a description of her, and a description of the defendant, is another ground of complaint. It was offered in connection with the evidence of the under-sheriff, who testified that at the instance of Murray, and while he had the warrant in his hands, he searched for the defendant and the mare in and about Olathe, and to aid in finding them they had printed a large number of such postal cards, and distributed them over the states of Kansas and Missouri. It was competent to show the search for the defendant, and that he fled from the state, but a copy of the printed postals which were mailed was hardly competent evidence. The reception of the notice, however, was not prejudicial to the defendant, as the testimony conclusively showed that he obtained the mare upon the representation that he was going to Olathe, that he did not go to

## The State v. Eberline.

Olathe, that he never returned the mare to her owner, and that he fled the state and became a fugitive from justice. Under such a state of facts, the reception of the printed postal was immaterial and harmless.

There are no other objections which require notice, and finding no error in the record, the judgment of the district court will be affirmed.

All the Justices concurring.

## THE STATE OF KANSAS V. GEORGE EBERLINE.

1. EVIDENCE—*No Error*. The evidence examined, and found, that no error was committed in excluding certain testimony.
2. WITNESS—*Character*. While evidence of a witness's bad character for veracity is admissible, such inquiry must be confined to the character of such witness for truth and veracity.
3. INSTRUCTIONS—*No Error*. Instructions given and refused considered, and found that no error was committed.

*Appeal from Johnson District Court.*

THE opinion states the case.

*John T. Little*, and *I. O. Pickering*, for appellant.

*John N. Ives*, attorney general, and *S. D. Scott*, county attorney, for The State; *F. R. Ogg*, of counsel.

Opinion by GREEN, C.: This was a criminal prosecution, under § 31 of the crimes act. The defendant was charged with carnally knowing Sallie Eberline, *alias* Sallie Fahner, a female child under the age of eighteen years. He was convicted in the district court of Johnson county at the January term, 1891, and sentenced to the penitentiary for a term of six years. He appeals from that judgment and sentence to this court, and the following errors are assigned: First, it is

47	155
62	445
47	155
178	858



claimed by the appellant that there was a conspiracy formed to send him to the penitentiary, and that this fact could have been established to the satisfaction of the jury, had the court below permitted the evidence to go to the jury. Second, that it was competent for the defendant to show the general reputation of the prosecutrix for virtue and chastity, but that the court refused to permit such evidence to go to the jury, even for the purpose of affecting the weight of her evidence. Third, that the court erred in refusing the fourth, fifth and sixth instructions requested by the appellant. These errors we shall consider in their order.

I. There was no evidence upon the part of the state tending to show any conspiracy. Upon cross-examination of the prosecutrix, she was asked if she had not talked with a man by the name of Snell about this case, and the state interposed an objection, which was sustained by the court, and this is assigned as error. This evidence was immaterial. The witness denied that there had been any effort upon the part of her mother, Snell or herself to injure the defendant; and any conversation she may have had with Snell about the case was irrelevant. Snell was not a witness, and if the defendant had desired to establish some foundation for a conspiracy, he should have asked more specific questions.

II. It is insisted that it was competent for the defendant to prove the general reputation of the prosecutrix for chastity and virtue, not as a justification or an excuse for the crime, but for the purpose of affecting her evidence. We do not so understand the rule. While evidence of a witness's bad character for veracity is admissible, the inquiry in such a case as this must be confined to the witness's character for truth and veracity. (*Taylor v. Clendenning*, 4 Kas. 525; 3 Am. & Eng. Encyc. of Law, 117, and authorities there cited.)

III. We have examined the instructions given by the court, and also those refused, and also the observations of counsel concerning them. The fourth instruction asked and refused was covered by the fourth paragraph of the general charge of

the court. The fifth instruction requested by the defendant did not state the rule correctly. It was not necessary for the state to prove force under § 31 of the crimes act, and the fact that the prosecutrix claimed that force was used was wholly immaterial. The refusal of the court to give the sixth instruction asked for was no ground for error. The court had told the jury, in the second paragraph of its charge, that carnally and unlawfully knowing a female under the age of 18 years constituted the crime with which the defendant was charged. The prosecutrix had testified that the defendant had had sexual intercourse with her. The language of the court and the statements of the prosecutrix could not have been misunderstood. The words used have a well-defined and understood meaning, and there could be no question but that the jury understood what was meant.

We recommend an affirmance of the judgment.

By the Court: It is so ordered.

All the Justices concurring.

---

*In the matter of the Petition of C. L. SWARTZ for a Writ of Habeas Corpus.*

1. *Laws—Enactment.* All laws shall be enacted by bill. (Const., art. 2, § 20.)
2. ——— *Publication.* Laws of a general nature are not in force until after publication thereof. (Const., art. 2, § 9.)
3. ——— *Invalid Publication.* The publication of an act, omitting the enacting clause, is not a valid publication thereof.
4. *PROSECUTION, Premature.* Prosecution under an act not yet published is prematurely brought.

*Original Proceeding in Habeas Corpus.*

THE case is sufficiently stated in the opinion, filed October 10, 1891.

*H. L. Strohm*, for petitioner.

*J. N. Ives*, attorney general, and *R. B. Welch*, county attorney, for respondent.

Opinion by STRANG, C.: At the April term, 1891, of the district court of Shawnee county, the grand jury thereof returned an indictment containing three counts against C. L. Swartz, charging him with having in said county published, circulated and had in his possession the Kansas City *Sunday Sun*, a newspaper devoted largely to the publication of scandals, lechery, assignation, intrigues between men and women, and immoral conduct of persons. May 8, 1891, warrants were issued on said indictment, upon which the said C. L. Swartz was arrested, taken and held in custody of the sheriff of said county. Afterward, May 16, 1891, the defendant applied to this court for his discharge from said arrest upon *habeas corpus*, alleging, among other reasons for his discharge, the following, to wit: That the act of the legislature under which said indictment was found was not in force at the time said indictment was found, nor when the offenses therein charged are alleged to have been committed, for the reason that said act had not at such times been published. The indictment was found at the April term, 1891, and it charges that the offenses complained of were committed during said month of April. An examination of the subject shows either that a resolution of the legislature prescribing against the acts alleged in the indictment in the case against the petitioner was published March 21, 1891, or that an attempt was made to publish an act of the legislature on that day, which publication omitted an essential part of said act, to wit, the enacting clause. If there was an attempt on the part of the legislature to create a crime and provide for the punishment thereof by resolution, such attempt is in violation of § 20 of article 2 of the constitution, which provides that "No law shall be enacted except by bill." If, as we believe, there was simply a mistake in the publication of the act on the 21st day of March by omitting the proper enacting clause, and the act was not

## Opinion of the Court.

properly and legally published until May 16, 1891, then such act was not in force at the time the said indictment was found against the petitioner, nor when the offenses therein charged are alleged to have been committed. "No law of a general nature shall be in force until the same be published." (Const. art. 2, § 3.) The publication of an act of the legislature, omitting the enacting clause or any other essential part thereof, is no publication in law. The enacting clause of all laws shall be, "Be it enacted by the legislature of the state of Kansas." (Const., art. 2, § 20.) The law not being in force when the indictment was found against the petitioner, nor when the acts complained of therein were done, the petitioner could not have been guilty of any crime under its provisions, and is, therefore, so far as this indictment is concerned, entitled to his discharge.

There is another indictment mentioned in the return of the sheriff, a copy of which is also attached to the petition in the case. But, so far as we know, no warrant has been issued thereon. Both the warrants attached to the sheriff's return and also to the petition in the case show that they were issued upon the indictment already considered. The second indictment charges a misdemeanor. The charge in each of the warrants attached to the sheriff's return, and under which he says he held the petitioner, is a felony. It not appearing that the petitioner has been arrested, or is held upon any warrant under the second indictment, we think he is entitled to his discharge. As the act under which the petitioner was proceeded against in the district court was properly published on May 16, 1891, and other prosecutions may follow under its provisions, we suggest that the paper, the publication of which is complained of, or so much of it as contains the matter complained of, shall be attached to any new complaint which may be made.

We recommend that the application of the petitioner be allowed, and an order for his discharge entered.

By the Court: It is so ordered.

All the Justices concurring.

## THE STATE OF KANSAS V. JOSEPH J. SPENDLOVE.

1. **MURDER — Amended Information — Practice.** An information was filed charging the defendant with murder in the first degree. Subsequently the defendant was tried, convicted, and, upon appeal to the supreme court, the conviction was set aside and a new trial granted. Thereafter, the county attorney, without consent of the court, and without notice to or the consent of the defendant, filed an amended information, also charging the defendant with murder in the first degree. The defendant made no motion to strike the amended information from the files, but filed a motion to quash, upon the ground, among others, that the information was filed without leave of the court and without notice to him or his consent. After the motion to quash was filed, and before it was passed upon by the court, the prosecution obtained leave of the court to indorse the names of additional witnesses upon the amended information. The defendant objected, but notified the court that he desired a copy of the amended information to be served upon him. Subsequently, he refused to plead to the amended information, and asked to be tried upon the old information. The court directed a plea of not guilty to be entered for the defendant upon the new or substituted information, and required him to be tried thereon. He was subsequently convicted of manslaughter in the first degree. *Held*, That the amended or substituted information must be considered as occupying the same position after the indorsements of the names of additional witnesses thereon and the refusal to quash, as if the court had expressly allowed the information to be amended or substituted and filed.
2. **STATUTE, Construed.** Section 12, chapter 81, of the act relating to crimes and punishments, ( § 2133, Gen. Stat. of 1889,) is expressly applicable to all crimes or misdemeanors, not amounting to felony, and an assault and battery is within the statute. Intentional violence upon the person killed is not excluded by the statute.
3. **JUDGMENT — Technical Errors.** Judgment must be given in the supreme court upon appeal in criminal cases without regard to technical errors or instructions which do not affect the substantial rights of the parties.

*Appeal from Shawnee District Court.*

PROSECUTION for murder in the first degree. From a conviction for manslaughter in the first degree, at the January term, 1891, the defendant, *Spendlove*, appeals. The facts are

47	160
52	544

47	160
55	357

47	160
e67	805

47	160
e70	686

47	160
180	404

47	160
81	23
82	392

---

Opinion of the Court.

---

substantially stated in *The State v. Spendlove*, 44 Kas. 1-11, and in the opinion herein, filed on October 10, 1891.

*A. H. Case*, *J. S. Ensminger*, and *Charles Curtis*, for appellant.

*John N. Ives*, attorney general, and *R. B. Welch*, county attorney, for The State.

The opinion of the court was delivered by

HORTON, C. J.: An information was filed in the district court of Shawnee county charging Joseph J. Spendlove with murder in the first degree, in killing and murdering Gustave Werner. He was tried at the September term, 1889, of the district court of said county, convicted of murder in the second degree, and sentenced to imprisonment for the term of 21 years. He appealed, and this court reversed the judgment at its January term, 1890. (*The State v. Spendlove*, 44 Kas. 1-11.) After the case was reversed, and on the 27th day of September, 1890, without leave of court and without notice to the defendant, the county attorney filed an amended information, in which he charged the defendant with murder in the first degree. The defendant filed a motion to quash this amended information, and set up, with others, the following reason: "That said amended information was filed by the county attorney after the defendant had entered a plea of not guilty in the case, and without leave of the court, and without the notice, knowledge or consent of the defendant." After the motion to quash was filed, but before it was passed upon, the prosecution applied to the court to indorse the names of additional witnesses upon the amended information. The defendant objected, but the court granted the application, and thereupon the defendant excepted, and gave notice that unless another copy of the amended information, with the additional names indorsed thereon, was served upon the defendant, he would, at the proper time, object to being tried upon the amended information. The motion to quash was overruled by the court, to which ruling the defendant at the time ex-

---

The State v. Spendlove.

---

cepted. The defendant demanded a trial upon the old information, refused to plead to the amended information, and objected to the introduction of evidence under the amended information. All of these motions were overruled by the court, and excepted to by the defendant. He was tried upon the amended information, found guilty of manslaughter in the first degree, and sentenced to imprisonment in the penitentiary for 16 years. From this he appeals to this court.

Section 72 of the criminal procedure reads:

"An information may be amended in matter of substance or form at any time before the defendant pleads, without leave. The information may be amended on the trial as to all matters of form, at the discretion of the court, when the same can be done without prejudice to the rights of the defendant. • No amendment shall cause any delay of the trial, unless for good cause, shown by affidavit."

It has already been decided by this court that, after a new trial has been granted, the attorney for the state, with consent of the court, may enter a *nolle prosequi*, and thereafter the defendant may be put upon his trial and convicted upon a new information, charging the identical offense set forth in the prior one. (*The State v. Hart*, 33 Kas. 218.) The amended information in this case was filed on the 27th of September, 1890. The motion to quash was filed on the 13th day of December, 1890. This motion was overruled on the 26th day of January, 1891. No motion was made to strike the amended information from the files. When the motions to indorse additional names and to quash the amended information were presented to the court, the court's attention was thereby called to the matters contained in the new information, and when one motion was allowed and the other overruled, the court thereby gave permission for the new information to be substituted for the old one. The amended information, therefore, was filed with leave of the court. From and after January 26, 1891, the amended information occupied the same position as if the court had expressly allowed it to be filed. When the defendant refused to plead

1. Murder—  
amended in-  
formation.

---

*Opinion of the Court.*

---

to this information, the court properly directed a plea of not guilty to be entered. The amended information was filed in ample time, and as the trial court permitted the same to be substituted, no error prejudicial to the rights of the defendant can be fairly founded upon the rulings of the court in refusing to try the defendant upon the original information, or in requiring the defendant to be tried upon the amended or substituted information.

Upon the trial, after instructing the jury concerning murder in the first and the second degrees, the district court further instructed the jury that—

“Next, as to manslaughter in the first degree. To constitute manslaughter in the first degree, the act must be the killing of a human being without a design to effect death, by the act, procurement, or culpable negligence of another person, while such other person is engaged in the perpetration of, or attempting to perpetrate, some crime or misdemeanor, not amounting to felony, in case where such killing would be murder at the common law. . . . In this case Joseph J. Spendlove is charged with the crime of murder in the first degree, as recited in the amended information, and while this is nominally the charge made in the amended information, in contemplation of law, however, it includes the charge of murder in the second degree, and the charge of manslaughter in each of the four degrees described in the statutes of the state, as already explained, and the amended information would allow a verdict of guilty in any of these minor offenses, provided the evidence in the case would warrant such a verdict. . . . If the guilt of the defendant is not proven to be that of murder in the first degree or second degree, or of manslaughter in the first degree, beyond a reasonable doubt, then you may proceed to inquire whether he is guilty of manslaughter in the second degree.”

These instructions were properly excepted to. It is contended upon the part of the defendant that it was error to give the instructions referred to, and it is further contended that there was no evidence introduced upon the trial proving or tending to prove a case of manslaughter in the first degree. We are therefore called upon to construe § 12 of chapter 31, of the act regulating crimes and punishments. (Gen. Stat. of



---

The State v. Spendlove.

---

1889, ¶ 2133.) That is the section under which the defendant was convicted. It reads:

“The killing of a human being, without a design to effect death, by the act, procurement or culpable negligence of another, while such other is engaged in the perpetration, or attempt to perpetrate, any crime or misdemeanor, not amounting to a felony, in cases when such killing would be murder at the common law, shall be deemed manslaughter in the first degree.”

This section appears in chapter 48 as § 7 of the Territorial Laws of Kansas for 1855. It has been continued in force since that time. (Terr. Stat. of Kas. 1859, ch. 28, § 7; Comp. Laws of 1862, ch. 33, § 7; Gen. Stat. of 1868, ch. 33, § 12; Comp. Laws of 1879, ch. 31, § 12; Gen. Stat. of 1889, ¶ 2133.)

In support of the contention of the defendant, it is said that § 12 of chapter 31 was borrowed from Missouri; that, as the supreme court of that state has decided that, to bring a case under this statute within manslaughter in the first degree, it is necessary to show the accused was committing, or attempting to commit, some misdemeanor other than intentional violence upon the person killed; that the facts in this case conclusively establish that the instruction concerning manslaughter in the first degree was wholly applicable; and that the verdict was without any evidence whatever to support it. The claim is, that the jury might as well have found the defendant guilty of manslaughter in the first degree in assisting Werner in the commission of self-murder, or of manslaughter in the first degree for the willful killing of an unborn child.

Our statute was evidently taken from Missouri, as the Missouri statute is identical with it. (Rev. Stat. Mo. 1879, § 1238.) But the rule of *Bemis v. Becker*, 1 Kas. 217, that whatever construction has been given to the statute by the courts of Missouri must follow it to this state, does not hold good, because the supreme court of Missouri, prior to 1855, when this statute was incorporated into the body of the criminal laws of Kansas, had not judicially construed or interpreted it. In 1871, long after the statute referred to was first adopted

## Opinion of the Court.

by the legislature of Kansas, the supreme court of Missouri, in *The State v. Sloan*, 47 Mo. 604, construed the statute as before stated. In support of its decision it referred to the following cases from New York: *The People v. Butler*, 3 Parker's Crim. Rep. 377; *The People v. Sheehan*, 49 Barb. 217; *The People v. Rector*, 19 Wend. 605. In *The State v. Downs*, 91 Mo. 19, decided in 1886, the case of *The State v. Sloan* was approved.

From 1838 to 1867, and for some time after that year, New York had a statute similar to the statute of Missouri and our own. (2 N. Y. R. S. 656-7.) Since then the statute has been changed in New York, and manslaughter in the first degree is now defined as follows:

"In a case other than one of those specified in the §§ 183, 184, and 185, homicide, not being justifiable or excusable, is manslaughter. Such homicide is manslaughter in the first degree, when committed without a design to effect death, either, (1) by a person engaged in committing, or attempting to commit, a misdemeanor, affecting the person or property either of the person killed, or of another; (2) in the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon." (Vol. 2, N. Y. Rev. Stat. of 1890, page 1382.)

All of the decisions referred to by the Missouri supreme court are decisions of inferior courts in the state of New York, excepting the case of *The People v. Rector*, 19 Wend. 605. In that case, Cowen, J., expressed one opinion. Bronson, J., delivered a different opinion, and the chief justice finally decided the case, principally agreeing with Bronson, J., but saying little, if anything, concerning the construction of the statute relating to manslaughter in the first degree.

In the case of *Darry v. The People*, 10 N. Y. 120 (1854), opinions were delivered by Selden, J., Denio, J., and Parker, J., favoring a new trial. Three other members of the court of appeals concurred in their views, and reversed the judgment of the supreme court.

Selden, J., in referring to *The People v. Rector*, 19 Wend. 569, said:

"This subdivision was incidentally and partially consid-

---

The State v. Spendlove.

---

ered, but the examination given to it was cursory merely, and no attempt was made to subject it to the rigid analysis which is indispensable to the development of its true meaning."

Denio, J., in his opinion said:

"I have not overlooked the opinions incidentally expressed by Chancellor Walworth and Mr. Justice Bronson, in *The People v. White*, (24 Wend. 520,) and in *The People v. Rector*, (19 Wend. 569.) In neither of these cases was this question presented; and in both of their opinions, those learned judges were dissentients from the judgment of the court upon the points decided in those cases."

Parker, J., in criticising *The People v. Rector*, 19 Wend. 591-608, said:

"But it has been said that the 6th section of the statute defining manslaughter in the first degree is not applicable to a case where the party causing death without design is engaged in an assault and battery. I find no warrant for such a position. No exception of that offense is made in the statute. The language is, 'the killing of a human being, without a design to effect death, by the act, procurement, or culpable negligence of another, while such other is engaged: (1) in the perpetration of any crime or misdemeanor not amounting to a felony; or, (2) in an attempt to perpetrate any such crime or misdemeanor, in cases where such killing would be murder at the common law, shall be manslaughter in the first degree.' This section is thus made expressly applicable to all crimes and misdemeanors not amounting to felony, and it is certain an assault and battery is one. The statute nowhere confines this section and the third subdivision of the section defining murder to other offenses than those of intentional violence. It is said that this plain construction of the act would make every case murder, because, being engaged in an assault, and death ensuing, it becomes the felony of manslaughter, and being engaged in such felony, and death ensuing, it is murder. But it leads legitimately to no such result. The intent regulates the crime, unless otherwise provided. If the party intends an assault and battery, and death ensues without design, he is guilty of manslaughter. If he intends a mayhem or other felony to the person, and death ensues without design, it is murder. . . . It is objected, that if my construction of the first degree of manslaughter is correct it would cover every other degree of manslaughter. For in every case provided for in the lower

## Opinion of the Court.

degrees there is also an assault and battery, and death ensues. I answer, the general description in the first degree cannot be considered as applicable to cases particularly described in the lower degrees. The first degree gives the general description; the lower degrees the exceptions, as where the act is done in the heat of passion, etc. It is far more consistent to hold that the description in the first degree does not apply to cases described in the second and third degrees, than to hold it is not applicable to any case of assault and battery where death ensues. There is much less violence done to the language of the section by my construction than by that against which I contend. There is reason in holding that the first section, being in general terms, is not applicable to cases specially described. Though within the general language, it may well be supposed the legislature did not intend to include them, because they are provided for specially in other sections. But it seems to me it is refusing obedience to the statute to say that it is not intended to be applied to any case of assault and battery, when no exception of that offense is made."

Heretofore we have never been called upon to construe said § 12. It is an original question with us. The decisions of Missouri were made subsequent to the adoption of our statute; therefore they are not conclusive. The Missouri supreme court has followed certain decisions of New York, and construed its statute according to those decisions. If we are to go to New York for decisions construing this statute, the views of the judges in *Darry v. The People*, supra, are more satisfactory to us than any others. We prefer to take the construction of the statute by the highest court of the state, rather than from inferior tribunals. The statute is "expressly applicable to all crimes or misdemeanors not amounting to a felony, and an assault and battery is one."

2. Statute, construed.

There are no exceptions as to any crime less than a felony. Intentional violence upon the person killed is not excluded. If we follow the Missouri construction, we virtually wipe out said § 12, because, as judicially interpreted by that court, it can have but little operation. We therefore conclude that the instructions referred to were not inapplicable to the case, and that there was sufficient evidence introduced upon the trial to

---

The State v. Spendlove.

---

authorize the jury to find the defendant guilty of manslaughter in the first degree.

The defendant requested the district court to give the following instruction:

"The law at the outset clothes the defendant, in a criminal case involving the charge of murder, with the presumption of innocence, and when the proof tends to overthrow this presumption and to fix upon the defendant the perpetration of such a crime, the latter is permitted to support the original presumption of innocence by proof of good character for peace and quietness, and the good character of the defendant for peace and quietness is itself a fact in the case. It is a circumstance tending, in a greater or less degree, to establish his innocence. And therefore, in the present case, the good character of the defendant, if proven to your satisfaction, is to be considered by you, in connection with the other facts in this case, in determining the guilt or innocence of the defendant."

The court refused this instruction, but gave the following:

"There has been evidence offered by the defendant respecting his good character as a peaceable, orderly, law-abiding citizen. Such evidence is competent and proper to be considered by the jury, in connection with the other evidence in the case, in determining the guilt or innocence of the defendant respecting the matters charged against him. Such evidence is particularly important for the defendant in cases where there may be doubt as to his guilt, and in all such cases good character, if clearly proven, should resolve such doubt, whatever it may be, in favor of the defendant; but in cases where all the evidence in the case clearly shows guilt beyond a reasonable doubt, then former good character would be of little avail."

The instruction given, as was stated in *The State v. Douglass*, 44 Kas. 618, is subject to criticism. Evidence in criminal cases of the good character of the defendant may be introduced for the purpose of disproving guilt; and if, upon the whole of the evidence introduced, including that of the good character of the defendant, the jury entertain a reasonable doubt as to the defendant's guilt, he should be acquitted. (3 Am. & Eng. Encyc. of Law, 110, 111.) But the instruction given is not as bad as those condemned in *Kistler v. The*

## Opinion of the Court.

*State*, 54 Ind. 400, and *The People v. Doggett*, 62 Cal. 27. In the Kistler case, the court instructed the jury that "where the guilt is positively proven, then good character will not benefit the defendant." In the Doggett case, the court instructed the jury "that good character was only applicable in doubtful cases to turn the scale, when the jury was in doubt, from the other evidence, as to whether the defendant was guilty or not." The last two or three lines of the instruction given ought to have been omitted, but we are unwilling to say that the instruction was so erroneous or misleading as to demand a new trial.

After the district court had instructed the jury at very great length concerning murder in the first and the second degree, and the various degrees of manslaughter, it further instructed the jury as follows :

"If you do not find beyond a reasonable doubt that the defendant, Spendlove, deliberately fired a shot at Werner in the front room of the building, and that Werner retreated in attempting to get away from the defendant into another room, and that the defendant, Spendlove, followed the deceased to the door or opening into another room for the purpose of further assaulting the deceased; or if you have a reasonable doubt upon either of these propositions, then if Spendlove did not commence the combat by firing deliberately a loaded pistol at the body of Werner within striking distance of said Werner, but that Werner and Spendlove went to or near the door or entrance to the back room, and the combat there took place, then I instruct you—"

And thereupon gave ten instructions, marked A, B, C, D, E, F, G, H, I, and J. D was as follows :

"If the evidence leaves you in doubt as to what the acts of the deceased were at the time or immediately before the killing, you may consider the threats and character of the deceased in connection with all the other evidence in determining whether he was probably the aggressor."

It is contended that the language just prior to A, B, C, etc., was misleading; that it prevented the jury from considering all the instructions before reaching a verdict; that they

were prevented from considering the theory of the defense until after they had considered all of the evidence of the prosecution and were in doubt upon that of the guilt of the defendant.

In addition to the instruction D, concerning threats, etc., of the deceased, the court also instructed the jury in J, as follows:

"If you should believe from the evidence that Werner made threats towards or against Spendlove, or that he entertained ill feeling towards him, or that he was a wicked or depraved person, this would not excuse or justify Spendlove or any other person to make an assault on him or kill him. No person can take the law into his own hands to correct his real or imaginary grievances or wrongs. But if you believe from the evidence that the deceased, Werner, was an irritable and quarrelsome man, or that he had made threats to put Spendlove out of the building; that he would cut his throat if he didn't get out, or run his scissors through him if he did not get out; or, that if he fooled with him he would learn a trick or kill him; or, if on the day of the shooting he said, if Spendlove was not out of there inside of 24 hours he would be carried out; that on the evening of the occurrence Werner was nervous, sweating, and talking about his trouble, and that he was going to put Spendlove out; and that Werner had been indicted for selling intoxicating liquors and accused Spendlove of having him indicted and was mad about it; and if you are satisfied that several persons saw Werner have a revolver with him a few days before the shooting, and that but one revolver was found at the place, and that was found between Werner's legs, and no explanation has been made of what became of the revolver seen in Werner's possession before the shooting, then I instruct you that you should take such of the above matters, as you believe to be established by proof, into consideration in determining the part Werner took in the affair and in determining the guilt or innocence of the defendant."

We think that the prefix to A, B, C, etc., might have been properly omitted; and yet, in view of all the instructions given, we do not think that it diverted the attention of the jury from all the instructions given, or withdrew any part of the instructions, or the effect thereof, from the jury, to the prejudice of the rights of the defendant. At the last trial the threats and

## Opinion of the Court.

actions of the deceased were fully commented upon, and the attention of the jury directly called thereto. If the jury had found the defendant guilty of murder in the first or second degree, the argument would be much stronger in favor of the theory that the language just prior to A, B, C, etc., might have been prejudicial. But with a verdict of manslaughter in the first degree only, the jury of necessity, under the instructions of the court, must have considered A, B, C, etc., with the other instructions, and upon all the instructions and the evidence they reached the conclusion that the defendant was guilty of manslaughter in the first degree, but not of any degree of murder. The criminal code expressly provides that, on an appeal, the supreme court must give judgment without regard to technical errors and defects or to instructions which do not affect the substantial rights of the parties. (Sec. 293, Gen. Stat. of 1889, ¶ 5355.)

3. Judgment—  
technical  
errors.

The errors which we have referred to, in our opinion, are technical, not substantial.

The defendant has twice been tried. Upon the first trial, the verdict against him was for murder in the second degree. On account of the failure of the trial court to give a proper instruction concerning the threats of the deceased, we reversed that conviction, and granted a new trial. We all concurred in the judgment of reversal; but some things were said in the opinion, in the way of argument, about insufficient or unsatisfactory evidence, that it was not necessary for all of us to approve as conclusions of fact from the evidence introduced. Spendlove has been convicted again; this time of manslaughter in the first degree. There is evidence in the record sustaining the conviction. The other alleged errors presented to us have also been fully considered. We do not think any of them sufficient to demand another trial. The evidence, although not as satisfactory as we could wish, convinced the last jury of the guilt of the defendant of manslaughter, and the district court has approved that verdict and passed sentence thereon. Upon the record, we decline to interfere further.



The judgment of the district court will be affirmed.

JOHNSTON, J., concurring.

VALENTINE, J.: I concur in affirming the judgment, but I do not wish to be understood as concurring in all that is said in the foregoing opinion. The case is a perplexing one. Additional evidence was introduced on the last trial showing additional threats on the part of Werner, and that he owned or possessed a revolver. Among such additional evidence is that of Charles Beams, who testified, among other things, that on the evening of March 20, 1889, the evening on which the shooting occurred, at about 7 o'clock in the evening, or within two hours before the shooting occurred, he went to Werner's place of business, the place where the shooting occurred, and he there saw Werner with a revolver in his hand. With reference to this matter Beams testified, among other things, as follows: "He (Werner) was in the back part of the room, standing with his back to the door when I first went in. I walked back toward him and he turned around, and he had a 38 or 34 calibre revolver in his hand, as near as I could tell. I was within about eight feet of him. He was muttering over something, I could not understand what it was." A revolver with which it was claimed the shooting was done was then shown to the witness, and he was asked if the revolver which Werner had resembled that one, and he answered: "It looks like it, but I could not say whether this is the revolver. That is about the size of it, as near as I could ascertain." Only one pistol was found about the place. The case is a mystery; but as two juries have found the defendant guilty, one of murder in the second degree, and the other of manslaughter in the first degree, it should require a pretty strong case to authorize a reversal.

## JOSEPH SHIPPEN V. A. S. KIMBALL.

47	173
77	423

1. NATURE OF ACTION — *Statement in Affidavit.* In an action to foreclose a mortgage based on service by publication only, the affidavit to obtain the same alleged that personal service could not be made upon the defendant within the state, and "that this is an action brought for the recovery of real property under a mortgage, situated in said county of Lyon," and it was contended that the affidavit did not sufficiently state the nature of the action. *Held,* That it is imperfect in this respect, but not so defective as to render a judgment based thereon null and void or subject to a collateral attack.
2. MORTGAGE — *Foreclosure — Parties — Judicial Sales, not Void.* Wells entered a tract of public land at the United States land office, and obtained a certificate of entry, and immediately thereafter, and before the patent was issued, gave a mortgage thereon to Walker, to secure the purchase-money which was furnished by Walker, which mortgage was at once placed upon record. Shortly afterward Wells conveyed his interest in the land to C., by an assignment of the certificate of purchase, but this assignment was never recorded nor brought to the notice of the mortgagee. Later, default was made in the payment of the debt secured by the mortgage, and Walker brought an action against Wells, the mortgagor, to foreclose, but obtained only constructive service upon him, and, not knowing that C. was the assignee of the mortgagor, he was not made a party to the proceeding. A decree of foreclosure was rendered, and the land thereunder to Walker, which sale was confirmed by the court, and a proper sheriff's deed was executed to Walker for the land. Afterward, in pursuance of a judgment rendered against Walker, and a judicial sale on said judgment, the sheriff duly executed and delivered to K. a sheriff's deed, which conveyed the entire interest of Walker in the land, thus giving to K., through the foreclosure of the mortgage, the judgments, and the judicial sales, a clear chain of title from Wells, the common source of title, before C., who also claims under Wells, had any title or claim whatever on record. Up to this time the land was vacant, unoccupied, and unimproved, and the patent for the same had not been issued. Afterward the patent from the United States was issued directly to C., as the assignee of Wells. *Held,* That as C. had no title of record, the failure to make him a party to the foreclosure proceedings did not render the judicial sales and the purchases by Walker and K. void; and further held, that the equities and interest of the purchasers at such sales are superior and paramount to those of C.
3. PUBLIC LAND — *Assignment of Certificate of Purchase — Not Recorded — When Void.* An assignment of the certificate of purchase of land

---

Shippen v. Kimball.

---

from the United States may, under the registry laws, be proved or acknowledged and filed for record in the office of the register of deeds; and where it is neither proved nor acknowledged nor so filed for record, it is void under the registry laws of 1859 as to all subsequent purchasers for a valuable consideration without notice, (Act of 1859 relating to Conveyances, § 13,) and void under the registry laws of 1868 as to all persons except such as have actual notice of the assignment. (Act of 1868 relating to Conveyances, §§ 19, 21.)

*Error from Lyon District Court.*

THE facts are substantially stated in the opinion. Judgment for *Kimball*, at the September term, 1888. *Shippen* brings the case to this court.

*C. N. Sterry*, for plaintiff in error.

*J. R. McClure*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: A controversy arose between the parties to this proceeding with reference to the ownership of the southwest quarter of section 10, township 18 south, of range 10 east, situated in Lyon county, Kansas. Each of the parties had obtained a judgment upon constructive service quieting the title to the real estate in himself, but these judgments were vacated by stipulation, and the question as to who was the actual owner of the real estate as between them was submitted to the trial court without pleadings, and upon an agreed statement of facts, under the provisions of § 525 of the civil code. From the stipulated facts it appears that the land in controversy was purchased at the United States land office at Lecompton on October 6, 1859, by one Wesley Wells, by the location of a land warrant upon it, issued under the act of Congress of March 3, 1855. On the day of the location Wesley Wells executed to T. H. Walker a mortgage on the same tract of land, to secure the payment of a promissory note given by him to Walker for the sum of \$175.70, being the purchase-money for the land so purchased. The mortgage was recorded on October 7, 1859. On November 25, 1859, Wesley Wells made a written assignment of the certificate of

## Opinion of the Court.

location issued to him by the land office, and delivered the same to Morris Cohn, and authorized the assignee to receive the patent for the land, and on May 4, 1878, the United States issued to Morris Cohn, as the assignee of Wesley Wells, the patent for the land in controversy. This assignment of the certificate of location was never recorded nor brought to the notice of either Walker or Kimball until after each had procured his title. On August 10, 1863, Walker instituted a foreclosure proceeding against Wesley Wells alone, and endeavored to obtain constructive service upon him. The affidavit made and filed for the purpose of obtaining a constructive service stated, among other things, "that the service of a summons cannot be made on the said Wesley Wells within the state of Kansas; that this is an action brought for the recovery of real property under a mortgage, situated in said county of Lyon." The notice published pursuant to the affidavit reads as follows:

"Wesley Wells, in parts unknown, will take notice that Thaddeus H. Walker, of the county of Washington, state of New York, did, on or about the 10th of August, 1863, file his petition in the district court of the fifth judicial district of the state of Kansas, within and for the county of Lyon, in said state, against Wesley Wells, setting forth that the said Wesley Wells gave a mortgage to the said Thaddeus H. Walker, on the southwest quarter ( $\frac{1}{4}$ ), of section ten (10), township eighteen (18), range ten (10), situated in said county of Lyon, to secure the payment of one hundred and seventy five dollars and seventy hundredths (\$175.70), according to the terms of a certain note referred to in said mortgage, and dated October 6, 1859, payable 12 months after date, with interest from the date until paid at the rate of 4 per cent. per month. The said Wesley Wells is further notified that he is required to appear and demur to or answer said petition on or before the 23d day of October, 1863, or the same will be taken as confessed, and judgment rendered accordingly."

At the October term, 1863, a judgment was rendered in favor of T. H. Walker, decreeing a foreclosure and sale of the land described in the mortgage, and upon an order of sale is-

---

Shippen v. Kimball.

---

sued on the judgment a sale of the real estate was made by the sheriff of Lyon county on March 3, 1866, to T. H. Walker, which sale was confirmed by the court, and the sheriff executed and delivered to Walker a deed for the premises. On July 24, 1877, the sheriff of Lyon county, in pursuance of a judgment theretofore rendered by the district court against T. H. Walker, and a sale on said judgment, duly made, executed and delivered to A. S. Kimball a sheriff's deed, purporting to convey the land in controversy to A. S. Kimball; and it is agreed that Kimball by the deed received a conveyance of any and all interest which Walker ever had or obtained in the land in controversy. On May 4, 1878, Morris Cohn, who obtained the patent for the land as the assignee of Wesley Wells, conveyed and transferred all the title and interest which he acquired in the land to Joseph Shippen, the plaintiff in error, and he founds his title to the real estate upon this transfer and conveyance. The land in controversy has always been vacant, unoccupied, and unimproved, and at the time when the foreclosure proceeding of Walker against Wells was commenced in the district court of Lyon county, and ever since, Wells has been absent from the state of Kansas, and service of summons could not be had upon him within the state. Upon these facts the trial court determined that the equity of the case was with Kimball, and that he was the owner and entitled to the possession of the land in controversy. Shippen excepted, and comes here asking a reversal.

It is conceded that when Wesley Wells purchased the land in controversy from the United States, on October 6, 1859, he became the absolute owner thereof with the entire title thereto, except the bare, naked legal title, which still remained in the United States, and would remain in the United States until the patent for the land should be issued. It is also conceded that Wells then had the right to mortgage the property to Walker as he did, or to any one else, or to dispose of the same as he might see fit; and it must be held, under the authorities, that the service of summons in the foreclosure suit of Thad-

## Opinion of the Court.

deus H. Walker against Wesley Wells, made by publication, cannot in this collateral proceeding be held to be void, but must be held to be valid, although the affidavit for service by publication is to some extent defective. (*Ogden v. Walters*, 12 Kas. 282; *Claypoole v. Houston*, 12 id. 324; *Pierce v. Butters*, 21 id. 124; *Gillespie v. Thomas*, 23 id. 138; *Rowe v. Palmer*, 29 id. 337; *Harris v. Claflin*, 36 id. 543, 551; *Bogle v. Gordon*, 39 id. 31.) It is also conceded that, except for the title of Walker and Kimball to the property in controversy, the title of Shippen would be good, and he would be the owner of the property. All the transactions and proceedings had in the present case, giving to Walker his title, were had under the registry laws of 1859, chapter 30; while all the transactions and proceedings had giving to Kimball his title and transferring Walker's title to Kimball, were had under the registry laws of 1868, (Gen. Stat. of 1868, ch. 22,) which laws, with some amendments, are still in force. (Gen. Stat. of 1889, ch. 22.) And all the transactions and proceedings had which give to Shippen his title were had under the registry laws of 1859, up to October 31, 1868, when they were afterward had under the registry laws of 1868. We think the questions involved in this case are governed and settled principally by the registry laws.

Both Kimball and Shippen claim title to the property in controversy under the same original owner, Wesley Wells, who was the original purchaser of the land from the United States. Walker furnished the purchase-money; Wells purchased the property, received the certificate of purchase, and then mortgaged the property to Walker to secure the purchase-money, and this mortgage was immediately placed upon record. Afterward Wells assigned his certificate of purchase to Cohn; but it does not appear that this assignment was ever proved or acknowledged or filed for record, as it might have been under the provisions of the registry laws; and hence the assignment was void under the registry laws of 1859 as to all subsequent purchasers for a valuable consideration without notice;

1. Nature of action—statement in affidavit.

2. Public land—assignment of certificate of purchase—not recorded—when void.

## Shippen v. Kimball.

(Act of 1859 relating to Conveyances, § 13;) and void under the registry laws of 1868 as to all persons except such as had actual notice thereof. (Act of 1868 relating to Conveyances, §§ 19, 21.) Afterward, Walker foreclosed his mortgage against Wells and obtained a sheriff's deed for the property; and afterward, and on July 24, 1877, Kimball procured Walker's interest by virtue of another sheriff's deed, executed under a judgment against Walker. Afterward, the patent for the land was issued by the United States to Cohn as the assignee of Wells, and afterward Shippen succeeded to the interest of Cohn. In our opinion Kimball's interest in the land, as found by the trial court, is superior and paramount to that of Shippen. The assignment of the certificate of purchase by Wells to Cohn was, under the registry laws of both 1859 and 1868, void as to Walker and Kimball as purchasers, and, under the registry laws of 1868, was void as to them in all respects and as to every other person except such as had actual notice of the assignment. If it (the assignment) did not *affect* real estate at all, then of course it was void as to all persons; but if it did *affect* the real estate in controversy, then it was void as aforesaid for the reason that it had never been proved, or acknowledged, or filed for record, within the requirements of the registry laws. Neither Walker, as the purchaser of the land at the foreclosure sale, nor Kimball, the purchaser of the land at the sheriff's sale on the judgment against Walker, nor anyone else, at that time not having actual notice of Cohn's interest, was bound to take notice thereof, for the reason, as before stated, that such interest was not known by them nor shown by any record, and was void as to them. It was a mere secret equity, undiscoverable from any record, and void as aforesaid under the registry laws. No one not having actual notice is bound to take notice of what the statutes say is a nullity. At the time of the sale of the property to Walker, Cohn had no interest therein under the registry laws as against Walker, and at the time of the sale of the property to Kimball, Cohn had no interest therein under the registry laws as against Kimball, or as against anyone else not having actual

## Dissenting Opinion.

notice of Cohn's interest. Under the registry laws, and as to Walker, Wells was the absolute and entire owner of the property at the time of the first sale, and Cohn had no interest therein; and under the registry laws, and as to Kimball, Walker was the absolute and entire owner of the property, and Cohn had no interest therein, and both Walker and Kimball obtained a clear title to the property by their purchases. Besides, how could

2. Mortgage—  
foreclosure—  
parties—judi-  
cial sales, not  
void.

Walker know that he should make Cohn a party to his foreclosure suit when he did not know, and had no reasonable means of knowing, that Cohn had any interest in the land? On the other hand, as Cohn's and Shippen's claims were wholly under Wells, they were bound, after the mortgage from Wells to Walker was recorded, to take notice of the recorded mortgage, and bound to take notice of the records of the register's office and of the district court as to what became of the mortgage, or what was done with reference to it, until they themselves made it known by the records, or in some other way, that Wells had been completely divested of his interest in the property, and that they had succeeded to his rights. The equities of the case are certainly much stronger in favor of Kimball than of Shippen. Kimball's rights are prior in time, going back to the original purchase of the property from the government and the mortgage to Walker, and are founded upon a claim for the purchase-money, and are also largely founded upon or evidenced by records, and so much so that Shippen was bound to take notice of them; while Shippen's claims are not founded upon or evidenced by records at all, but are secret, hidden, and practically undiscov-  
erable equities.

The judgment of the court below will be affirmed.

HORTON, C. J., concurring.

JOHNSTON, J.: While I agree with the decision made upon the first point in the case, that the affidavit which formed the basis of jurisdiction was not so defective as to render a judg-



ment based thereon absolutely void, I am unable to agree with the second and third propositions that have been decided, or with the judgment of affirmance which has been rendered. It seems to me that the foreclosure and proceedings against Wells were a nullity for the reason that Wells had parted with his interest in the land before the foreclosure proceeding was begun, and that Cohn, who had before that time obtained the interest of Wells, was not made a party to the action. Wells entered the land and became the owner of all except the naked legal title, which, as has been stated, remained in the United States until May 4, 1878, long after the action of foreclosure was ended. It is true that Wells had authority to execute the mortgage to Walker, and also that the mortgage was duly recorded before Wells transferred his interest in the land to Cohn; and it is also true that, when Walker brought the action against Wells, he was the only person who by the record appeared to have any interest in the land. Notwithstanding this, I am of opinion that the foreclosure proceedings were absolutely null and void, for the reason that the assignee of the mortgagor, the only person who had any estate in the land, was not made a party. Wells sold the land to Cohn on November 25, 1859, shortly after the mortgage was executed, and thus Cohn acquired the entire interest held by Wells long before the foreclosure action was begun. It would hardly seem that the owner of the equitable title could be divested of his interest by a proceeding to which he was not a party and of which he had no notice. It is true that he did not place on record the assignment which had been made on the certificate of location, but I do not regard either the certificate or the assignment thereon as a conveyance or an instrument affecting real estate which under the statutes could have been recorded; and no record could be properly made by him until the patent was obtained from the United States. Walker acquired no estate in the land by the execution of the mortgage, and could not maintain ejectment against the mortgagor, or any one claiming under him, even after condition broken, until there had been a foreclosure and sale of the mortgaged

## Dissenting Opinion.

premises. The purpose of a foreclosure is to divest the land of the equity of redemption or the right of the holder of the legal title; but where the mortgagor has transferred his interest and the equity of redemption to another, who is not a party to the proceeding, what interest is affected by such a proceeding, and whose interest can be transferred by a sale under such a proceeding? Certainly the interest of one who is not before the court is not affected; and as the mortgagor, who was made a party, had no interest, there was nothing for the jurisdiction of the court to take hold upon, and therefore the judgment rendered is absolutely void.

It must be remembered that Wells had no personal notice, and therefore a personal judgment could not be given against him for the debt secured by the mortgage; and, as he had parted with all his interest in the land, he was neither a necessary nor a proper party in a foreclosure proceeding where only constructive service was had. He was the only party brought into court, and he had no estate or interest to be affected by the proceedings. The patent to the land was issued directly to Cohn, so that he now holds the complete legal title. The record does not show that the sheriff's deed to Walker, or the one subsequently made to Kimball, was ever placed on record, and at this time Shippen has a perfect title, so far as the record shows. While there are some equities on the side of the defendant in error, it is difficult to understand how there can be any validity in a judgment given in a case in which there was no defendant who had any interest whatever in the subject-matter of the suit, and, as was said in *Shields v. Miller*, 9 Kas. 397, "the judgment cannot be void and the sale made under it legal and valid. If the judgment is illegal and void, the sale must also necessarily be illegal and void." If it is granted that by this proceeding against the mortgagor alone, and the sale made thereunder, Kimball acquired the interest and was subrogated to the rights of Walker, the mortgagee, still he would only have a lien against the premises, and could not divest the same of the equity of redemption except by bringing Cohn, or whoever owned the

---

Fair Association v. Thummel.

---

same, into court in some proper proceeding for that purpose. He could have no greater interest in the land than was held by Walker, and it was ruled in an early case that a mortgage "is a mere security, although in the form of a conditional conveyance, creating a lien upon the property, but vesting no estate whatever, either before or after condition broken. It gives no right of possession, and does not limit the mortgagor's right to control it, except that the security shall not be impaired. He may sell it, and the title would pass by his conveyance, subject, of course, to the lien of the mortgagee." (*Chick v. Willetts*, 2 Kas. 391.)

From these considerations I am led to the opinion that Cohn was not divested of his interest by the foreclosure proceeding, and that Shippen, who holds under him, has the paramount title to the land. As sustaining this view, I cite *Britton v. Hunt*, 9 Kas. 228; *Lenox v. Reed*, 12 id. 223; *Richards v. Thompson*, 43 id. 213; *Curtis v. Gooding*, 99 Ind. 45; *Watson v. Spence*, 20 Wend. 260; 2 Jones, Mortg., §§ 1404-6.

The judgment of the district court should be reversed, and the cause remanded with the direction to enter judgment in favor of the plaintiff in error.

---

THE NEMAHA FAIR ASSOCIATION V. C. B. THUMMEL, as  
Chairman of the Board of Commissioners of Nemaha  
County, et al.

AGRICULTURE—State Board—County Society—Appropriation. In order to entitle a county or district agricultural society to representation in the state board of agriculture, the reports prescribed in § 2 of the act for the encouragement of agriculture (Gen. Stat. of 1889, ¶ 6250) must have been made; and unless these reports have been made at the times and in the manner required, such society is not entitled to demand an appropriation of the public moneys of the county, such as is provided for in § 8 of the act mentioned.

*Original Proceeding in Mandamus.*

THE opinion, filed on October 10, 1891, states the facts.

*R. M. Emery, and C. H. Stewart, for plaintiff.*

*Wells & Wells, for defendants.*

The opinion of the court was delivered by

JOHNSTON, J.: This is a proceeding in *mandamus*, brought originally in this court by the Nemaha Fair Association, to compel the chairman of the board of county commissioners of Nemaha county to issue and deliver to the plaintiff an order on the treasurer of the county for \$200. The claim is made under the provisions of "An act for the encouragement of agriculture," and particularly under § 8 of that act. (Gen Stat. of 1889, §§ 6249, 6257.)

In an earlier stage of this litigation, the validity of § 8 was challenged and sustained. (*Fair Association v. Myers*, 44 Kas. 132.) Since that time, Thummel was elected chairman of the board of county commissioners, to succeed Myers, and he has been substituted in the place of Myers as the defendant. The Sabetha District Fair Association, upon application, was made a defendant herein, and alleged that it was entitled to the \$200 in controversy, by reason of being a district agricultural society, and having held a fair, collected \$500 by voluntary contribution, and having made all necessary reports to the secretary of the state board of agriculture, and performed everything else required by law to be done to entitle it to the sum of \$200 from Nemaha county.

The statute having been held to be constitutional, the question remains whether the plaintiff has complied with the requirements of the statute so as to be entitled to demand from the county the statutory allowance. It is alleged in the alternative writ, that the plaintiff is a duly-organized agricultural society, formed November 24, 1882, "to encourage agriculture, horticulture, mechanics, and the fine arts, the im-

---

Fair Association v. Thummel.

---

provement of the breed of domestic animals, and to hold fairs for the exhibition of skilled industry and enterprise;" that its capital stock is \$7,000, which has been voluntarily contributed by the members, and is fully paid; that the plaintiff has held annual fairs in Nemaha county since its organization, and has paid annually to exhibitors not less than \$1,500 for premiums, and has annually sent a delegate from the society to the meeting of the state board of agriculture, which delegate has been duly recognized by and admitted as a member of that board. The writ further alleges:

"That the secretary of the plaintiff has made monthly reports to the state board of agriculture on the last Wednesday of each month since its organization, of the condition of the crops in its county, and made a list of such noxious insects as were destroying the crops, if any, and stated the extent of their depredations; and reported the condition of stock, giving a description of the symptoms of any disease prevailing among the same, with the means of prevention and remedies employed, so far as ascertained, and such other information as was of interest to the farmers of the state; and did also make out a statement containing a synopsis of the awards at the fair at the current year, offered and awarded as premiums for the improvement of stock, tillage, crops, implements, mechanical fabrics and articles of domestic industry, which exceeds the sum of \$1,500, and an abstract of the treasurer's account, and reported on the condition of agriculture in its said county of Nemaha to the state board, said statement being forwarded by mail to the state board on or before the 15th day of November of each year."

The facts which have been agreed upon, however, do not measure up with the allegations of the plaintiff. It is practically conceded by counsel that the Sabetha District Fair Association has not met the requirements of the statute, and is therefore not entitled to demand from the county \$200, or any other sum; and counsel for defendants insist that the Nemaha Fair Association is not entitled to the allowance for three reasons: (1) That it is not such an agricultural society as is contemplated by the act; (2) that it has not made the reports required by the statute; and (3) that it has not raised from

---

Opinion of the Court.

---

its members and paid into its treasury the required sum of money. The facts satisfactorily show that the first objection is not well taken, as the plaintiff appears to be an agricultural society such as would be entitled to the statutory bounty if it had complied with the requirements of the statute.

The second objection urged against the demand of the plaintiff is good, as it has clearly failed to follow the directions of the statute in respect to the making of reports. The conditions upon which a society can demand an allowance are clearly stated in the act providing for the same, and the making of monthly and annual reports to the state board of agriculture are among the most important. In respect to the monthly reports, it is provided, in § 2 of the act —

“That the secretary of each district or county society, or such other person as may be designated by the society, shall make a monthly report to the state board of agriculture, on the last Wednesday of each month, of the condition of crops in his district or county, making a list of such noxious insects as are destroying crops, and state the extent of their depredations, report the condition of stock, giving a description of the symptoms of any disease prevailing among the same, with means of prevention and remedies employed, so far as ascertained, and such other information as will be of interest to the farmers of the state.”

After the fair has been held, another report is required, containing a synopsis of the awards, as well as other information. The record discloses that no report was made for January or February of the year on which the demand was made, and that the first report made was on March 31, 1888, which is called a quarterly report, and contained most of the information required to be furnished in each monthly report. On May 31, 1888, a postal-card report was made, giving the condition of the crops, including apples and cherries, and also reporting with reference to rainfall and chinch-bugs, but no mention was made of the condition of stock. A postal-card report was made on June 30, 1888, similar to the one of the preceding month, and it contained no reference to the condition of stock, or the diseases prevailing among the same. On

July 31, 1888, a report covering substantially the same ground as the last one was made, and which was equally incomplete. On August 31, 1888, a report was made upon a postal card in respect to the area planted in corn, the difference in results between listed corn and that put in with a planter, and the estimated product per acre of the same. No other facts were stated in the report. In September, 1888, a full report was made as to the average yield of the various crops grown in the county, and the average value of the same, as well as the average value of live stock, and of the wages paid for farm laborers during the season. Nothing whatever was said about the condition of the growing crops or the noxious insects, nor about the condition of stock or the diseases prevailing among stock, as the statute requires. In the same month the annual report was made, which, although quite full, did not cover all the subjects upon which a report is required. No other reports were made or attempted during the year, and the reason given for the omission is that no others were required by the secretary of the state board. It is agreed that the secretary of the state board, for a long time prior to 1888, had assumed to and did direct, by means of blanks sent out to the various agricultural societies throughout the state, what information should be furnished to the office with respect to crops, stock, insects, etc., and that the plaintiff had filled up all the blanks sent to it, and answered fully all the questions asked by the secretary. It further appears that the secretary wrote to the plaintiff, stating that, on examination of the records of the office, it appeared that the plaintiff had made all the reports required by law, entitling it to a delegate to the annual meeting to be held on January 9, 1889. The delegate was elected by the plaintiff, and was recognized and admitted as a member of the state board at its annual meeting.

The plaintiff contends that as it has made all the reports required by the secretary of the state board, and as it was accorded representation in the state board at the annual meeting, that no other or further reports were necessary or essential to the payment of the \$200. The will of the legislature

## Opinion of the Court.

and not that of the secretary must control. The legislature has specifically provided when the reports shall be made, and what they shall contain, and has further provided that the making of these reports is a prerequisite to an allowance by the county. The society can demand the money from the county only when it "shall have complied *fully* with the provisions of the second section of the act, so as to be entitled to a representation in the state board of agriculture." (Gen. Stat. of 1889, ¶ 6256.)

County agricultural society; appropriation.

It is not left to the secretary nor to the state board to determine what acts are to be performed and what conditions exist to entitle a society to representation, or to entitle it to demand an appropriation of public money from the county. These limitations are fixed by the statute, and they can neither be ignored nor modified by the secretary. The fact that the society was given representation on the state board is not the test of its right to the money, but it is whether it was entitled to representation; and the statute provides that it shall not be so entitled unless it has made the monthly and annual reports. One of the principal objects of the state board of agriculture is the collection and dissemination of information of interest to the farmers of the state. To accomplish this beneficial purpose the monthly reports are required from the county and district societies, which in a certain sense form a part of the state board. In order to encourage the local societies in making these reports, and also in making an annual exhibit of the products of the county or district, the allowance of \$200 is authorized. If they are not made regularly and promptly, as the statute prescribes, the county is under no obligation to the society, and the chairman of the county board has no right to issue an order upon the county treasurer for \$200 or any other sum.

As the Nemaha Fair Association and the Sabetha District Fair Association have both failed to comply with the statutory requirements, neither of them is entitled to the relief demanded. The peremptory writ will therefore be denied.

All the Justices concurring.



SALLIE H. CARR v. A. M. HUFFMAN, as Sheriff of Hamilton County.

1. REPLEVIN—*Vacating Order of Delivery—Review.* An order of the district court vacating an order of delivery issued in an action of replevin is immediately reviewable in the supreme court; the aggrieved party is not required to await the final determination of the cause in the district court.
2. ——— *Practice.* An order of delivery cannot be set aside and vacated by the district court after answer for any informality or irregularity in its issue, or because no *præcipe* was filed by the party desiring it.

*Error from Hamilton District Court.*

THE opinion states the case.

*Milton Brown, and Kimball & Osgood, for plaintiff in error.*  
*A. J. Hoskinson, for defendant in error.*

Opinion by SIMPSON, C.: On the 25th day of January, 1888, Mrs. Carr commenced this action in replevin against Huffman, who was the sheriff of Hamilton county, to recover possession of a piano, of the alleged value of \$300, that the sheriff had seized under an execution against the husband of Mrs. Carr. This piano was situated in Kearny county, then attached to Hamilton county for judicial purposes. She gave bond for costs, and an undertaking in replevin, the sureties on which were approved by the clerk of the district court; filed the necessary affidavit; and an order of delivery was issued to the coroner of said county, that was served and duly returned with a redelivery bond, with sureties, in the sum of \$600. After this, Huffman filed an answer, consisting, first, of a general denial; and second, that as sheriff as aforesaid, under an execution against Sam. H. Carr, he had levied on the piano as the property of Carr. Afterward, the attorney of Huffman filed a motion to set aside and quash the order of delivery and the service thereof. This motion was filed after the

## Opinion of the Court.

answer of the defendant in error had been filed for some months. Before filing the motion to set aside the order of delivery the sheriff asked leave to withdraw his answer, and this was granted. The motion to set aside the order of delivery was sustained, and the court then permitted the sheriff to file an amended answer. The plaintiff in error asked leave to amend her petition and affidavit for replevin, and certain amendments were made. On the 22d day of October the plaintiff in error caused an *alias* order of delivery to be issued, directed to the sheriff of Kearny county, (that county having been organized,) which was served and returned with another redelivery bond. The defendant in error then filed a motion to set aside the *alias* order of delivery, and this was sustained.

The plaintiff in error is here complaining of all these rulings, and as to all but one we cannot review them, as no final disposition of the case has been made. The orders of the court for leave to plead and file motions and to amend we cannot now consider. The one most bitterly complained of is that of quashing and setting aside the first order of delivery, and as that is a final order that discharges a provisional remedy, we can review it. The motion directed against it enumerated the reasons why it should be set aside. The first is, "that it was prematurely issued, without the plaintiff filing a *præcipe* therefor with the clerk of the court." The code does not require that a *præcipe* shall be filed, but it is made the imperative duty of the clerk to issue an order of delivery whenever a certain proper affidavit is filed therefor and a sufficient undertaking entered into with the approved sureties. (Civil Code, §§ 176, 177.) It might be that the clerk, to protect himself, when he has doubts either as to the sufficiency of the affidavit or the legal form of the undertaking, can demand a *præcipe*, but after he issues the writ without such a demand it is too late to question the regularity of the proceeding. The second cause assigned is, "because the officer to whom the same was directed had no jurisdiction to execute the same, the writ showing on its face that the property was outside of his county;" and the third, that may be considered in connection with the

second, is, "because said order is issued for property outside of Hamilton county."

The writ was directed to the coroner of Hamilton county, an affidavit being filed that the sheriff was interested, being the defendant in the action. It described the property as being situate at Lakin, in Kearny county, Kansas, and the averment of the petition is that Kearny county, being unorganized, is attached to Hamilton county for judicial purposes. The district court of Hamilton county must take judicial notice of the attachment of Kearny to Hamilton county for judicial purposes, as we do, and hence none of the objections urged against the order of delivery were good, and did not authorize the court to set it aside. Besides, the defendant had answered, and it was too late to move against the order of delivery. To withdraw his answer, then interpose his motion to vacate the writ, and then ask and obtain leave to renew his answer as soon as the motion was disposed of, looks like trifling with the orderly course of judicial proceedings; and all this defendant in error did, and was permitted to do. This suit was commenced on the 25th of January, 1888. The answer of defendant was filed on the 24th day of February, 1888. On the 8th day of August, 1888, the defendant in error filed his motion to vacate the order of delivery. On the 15th day of August, 1888, he asked leave of the court to withdraw his answer and file his motion to vacate, and this was granted; and on the same day the motion to vacate was sustained, against the objections of the plaintiff in error; who then and there had her exceptions noted. On the 27th day of August, 1888, by permission of the court, the defendant in error filed what he calls an amended answer, being in legal effect the same as his original answer. It will be seen from this statement that the withdrawal of the original answer was a mere pretext to attempt to avoid the decision of this court in the case of *Kennedy v. Beck*, 15 Kas. 555, wherein the court holds that in an action of replevin it is too late to raise any question about the irregularity of the issue of an order of delivery on behalf of the defendant after he has filed his answer.

So that the effect of the trial court permitting these things to be done, if we should affirm them, would be to deprive the plaintiff in error from obtaining a writ of replevin. We regard the struggling efforts of the plaintiff in error, after the defendant in error filed an answer, to procure an *alias* order of delivery as null and void, and having no bearing on the question of the regularity of the original order of delivery.

We recommend that the order of the trial court vacating the original order of delivery be reversed, with instructions to overrule the motion, and for further proceedings.

By the Court: It is so ordered.

All the Justices concurring.

---

THE CHICAGO, KANSAS & WESTERN RAILROAD COMPANY V. JOHN E. WOODWARD, SR.

1. **NEW TRIAL**—*Harmless Error*. The introduction of immaterial evidence, which is not prejudicial to the rights of the defendant, is not sufficient ground to grant a new trial.
2. **EMINENT DOMAIN**—*Instructions*. Upon the trial of an appeal from the award of commissioners appointed to condemn a right-of-way for a railroad company along a highway, it is not error for the trial court to instruct the jury that they are not to take into consideration any benefits which might accrue to the plaintiff, by reason of any change in the location of such public highway.
3. **DAMAGES**, not *Excessive*. The evidence considered, and found that damages awarded by the jury are not excessive.

*Error from Saline District Court.*

THE facts sufficiently appear in the opinion.

*Geo. R. Peck, A. A. Hurd, and Robert Dunlap*, for plaintiff in error.

*Joseph Moore*, for defendant in error.

Opinion by GREEN, C.: This was an appeal from an award of condemnation proceedings to the district court of Saline county. One dollar was awarded as damages to the owner of the northwest quarter of the southwest quarter of section 5, township 14, range 2 west, in Saline county. A public highway runs through this land, and just north of it the track of the Union Pacific railway was located. The plaintiff in error built its railroad on this public highway, and condemned the interest of the owner in the public highway. Before the construction of its railroad the company laid out a public highway north of the Union Pacific track, and paid the defendant in error for the laying out of the highway through his land, and concerning this there is no controversy. That part of the highway where the railroad was constructed was not vacated. Upon the trial of the case, in the district court, the jury returned a verdict in favor of the plaintiff for \$425.60. The plaintiff in error brings the case here; and the first error assigned is in the admission of certain evidence upon the trial below. Complaint is made of the following question:

"Now, imagine the railroad built there, with its most injurious consequences; both railroads, the Santa Fé and the Rock Island: what, in your judgment and opinion, was the land worth per acre immediately after the building of those roads?"

This question was objected to as incompetent, irrelevant, and immaterial, which was overruled, and excepted to. The witness answered: "Well, I should think it would make considerable difference in the value of the land, to me, any way." The answer given by the witness was not responsive to the question, and should have been stricken out, but that was not asked. The question was not in fact answered; <sup>1. New trial—harmless error.</sup> what the witness did say was immaterial error, and was not sufficiently prejudicial to justify a reversal of the case. No objection or exception was made to the next question and answer, and we cannot consider the assignment of error based upon that evidence.

It is claimed that the court erred in permitting the report

## Opinion of the Court.

of the condemnation proceedings of the Chicago, Kansas & Nebraska Railway Company to be introduced in evidence. The evidence that a double track was laid on the right-of-way for both railroads, under the condemnation proceedings of the plaintiff in error, was, we think, competent. The evidence established the fact that the land in question was not embraced in the condemnation proceedings of the former railroad; that whatever was being done there was under the authority and direction of the plaintiff in error. We think the evidence was competent.

It is insisted that the court erred in permitting evidence to be introduced to show why the highway on the south side of the railroad track was not vacated by the board of county commissioners. We fail to see how this evidence could prejudice the plaintiff in error. The evidence may have been immaterial, but did not prejudice the rights of the railroad company.

Our attention is next called to the following instruction:

"The constitution of the state of Kansas provides that a railroad company must pay for its right-of-way over the premises of an individual, irrespective of any benefits that may accrue to the land-owner by reason of the proposed improvements. Therefore, you cannot take into consideration any benefits that may accrue to the plaintiff by reason of changing the public highway from the south side to the north side of the Union Pacific railroad."

Section 4 of art. 12 of the constitution says:

"No right-of-way shall be appropriated to any corporation until full compensation therefor be first made in money, irrespective of any benefit from any improvements proposed by such corporation."

This section of the constitution has been frequently construed by this court, commencing as far back as the case of *Railroad Co. v. Orr*, 8 Kas. 419, and extending down to *L. & W. Rld. Co. v. Ross*, 40 id. 598; and the court has universally held that a railroad company must make full compensation for the right-of-way appropriated, irrespective of any

---

 O. K. & W. Rld. Co. v. Woodward.
 

---

benefits or supposed benefits from the construction of the road, or any improvement thereby. Tried by this rule, which is supported and sustained by the decisions of other states with similar constitutional provisions, we think the instruction was not misleading or erroneous.

The last contention of the plaintiff in error is, that the damages awarded by the jury are excessive. The witnesses fixed the value of the land taken at from \$100 to \$125 per acre. The railroad occupied  $1\frac{2}{10}$  acres, and the jury awarded \$129 as the actual market value of the land taken, without reference to any damages to the remainder of the land. It is argued that, because the highway was not vacated, no compensation should have been awarded for the right-of-way at all, for under the statutes of this state, the railroad company had the right to construct and operate its railroad upon the public highway; that one of the uses to which it may be put is the construction and operation of a railroad along and upon the same. We are not prepared to subscribe to this principle. While the adjudicated cases are not uniform, the weight of authority is in support of the rule that the construction of a railroad along a highway imposes an additional burden, and constitutes a taking, within the constitution. The following cases hold that a railroad is not one of the legitimate uses of a highway, and for such an occupation there should be additional damages awarded to the adjoining owner: *S. P. Rld. Co. v. Reed*, 41 Cal. 256; *Imlay v. U. B. Rld. Co.*, 26 Conn. 249; *S. C. Rld. Co. v. Steiner*, 44 Ga. 546; *Cox v. Louisville Rld. Co.*, 48 Ind. 178; *Stange v. City of Dubuque*, 62 Iowa, 303; *Kucheman v. C. C. & D. Rly. Co.*, 46 id. 366; *I. B. & W. Rld. Co. v. Hanley*, 67 Ill. 439; *Phipps v. W. M. Rld. Co.*, 66 Md. 319; *Springfield v. Conn. Rld. Co.*, 58 Mass. 63; *Y. R. & Ind. Rld. Co. v. Heisel*, 47 Mich. 393; *Harrington v. St. P. & S. C. Rld. Co.*, 17 Minn. 215; *H. & G. I. Rld. Co. v. Ingalls*, 15 Neb. 123; *Williams v. N. Y. C. Rld. Co.*, 16 N. Y. 97; *Fanning v. Osborne*, 34 Hun, 121; *Chamberlain v. Cordage*

## Dissenting Opinion.

Co., 41 N. J. Eq. 43; *Rld. Co. v. Williams*, 35 Ohio St. 168; Mills, Em. Dom., § 32; Lewis, Em. Dom. 111.

The jury allowed \$280 damages to the land — \$230 to the land south of the railroad and \$50 damages to the land north of the track of the Union Pacific railroad. The different elements of damages the jury subdivided as follows: Danger and inconvenience of crossing, \$100; danger to stock from the south side of the track, \$100; and from accidental fire, \$80. While the damages allowed seem large, there was evidence to support the findings of the jury. Each item appears to be a proper element of damages. It is proper, in estimating damages, to take into consideration the exposure of the remaining land to fire from the company's trains or engines, set out by the railroad company, without fault, by reason of the operation of the road through the premises. (*K. C. & E. Rld. Co. v. Kregelo*, 32 Kas. 608.)

It is recommended that the judgment of the court below be affirmed.

By the Court: It is so ordered.

VALENTINE and JOHNSTON, JJ., concurring.

HORTON, C. J.: Upon the trial of this case in the district court, the jury returned a verdict in favor of the land-owner for \$425.60.

The court instructed the jury, among other things, as follows:

"The constitution of the state of Kansas provides that a railroad company must pay for its right-of-way over the premises of an individual, irrespective of any benefits that may accrue to the land-owner by reason of the proposed improvements. Therefore, you cannot take into consideration any benefits that may accrue to the plaintiff by reason of changing the public highway from the south side to the north side of the Union Pacific railroad."

This instruction had no application in this case, because it was not alleged, claimed or proved that, in the construction of the track or railroad, the land-owner derived any benefit.



But the instruction was misleading and prejudicial, because it prevented the jury from considering the benefits which the land-owner obtained from the highway upon the north of the Union Pacific. This was not an improvement from the construction and operation of the railroad, but was intended to be an improvement for the special benefit and convenience of the land-owner, and also for the use of others who desired the highway.

There was evidence tending to show that the larger tract of land, to which damages are claimed, was north of the Union Pacific railroad; and one witness testified that it was better to have the highway north of that road than south of it. Even if this road had not been paid for and constructed by the railroad company, the court ought not to have taken from the jury by an instruction the consideration of the convenience and benefits of this road, in view of the fact that the highway south of the Union Pacific track was partially occupied by the railroad company of which complaint was made. Before the land was taken or condemned for the right-of-way of the C. K. & W. Railroad Company, the tract was divided by the U. P. railroad. About 12 acres lay south, and some 20 acres north. The house referred to in the evidence was not upon the tract of land in controversy, but about a quarter of a mile west of the land. This belonged to other parties. The witnesses fixed the value of the land actually taken for railroad purposes by the C. K. & W. Railroad Company at from \$100 to \$125 per acre. The company condemned  $1\frac{29}{100}$  acres. For this the jury awarded \$129, as the market value of the land. The land taken was upon the highway, just south of the Union Pacific, which was not vacated, and yet the jury allowed nearly full value for the land—the same as if no highway had been established or existed; as if the land was without any incumbrance, and subject to no easement. These large damages, I think, were the result of the immaterial evidence admitted, against objections, tending to show why the highway on the south side of the railroad track was not vacated by the board of county commissioners, and the

## Waters v. Trovillo.

misleading instruction referred to. The highway was not vacated, and the evidence concerning the talk about its non-vacation was not only immaterial, but prejudicial. The erroneous evidence and improper instruction were the more harmful because of the great conflict in the evidence. It appears that several witnesses, some six in number, acquainted with the premises appropriated, testified on behalf of the railroad company that the value of the tract of land was the same after as before the construction of the railroad.

On account of the error in the admission of evidence, and the giving of an instruction which was misleading and prejudicial, I believe the judgment of the district court should be reversed, and the cause remanded for a new trial.

---

WATERS, CHASE & TILLOTSON V. H. T. TROVILLO, as  
Chairman of the Board of Commissioners of Wichita  
County, et al.

47	197
77	543

COUNTY BOARD—*Void Contract with Attorneys.* A contract made by the board of county commissioners, for the county, with attorneys at law, for their services as such, which services are such as the law requires the county attorney to perform, is *ultra vires* and void.

*Original Proceeding in Mandamus.*

THE opinion, filed October 10, 1891, contains a sufficient statement of the case.

*Waters, Chase & Tillotson*, plaintiffs, for themselves.

*W. B. Washington*, county attorney, and *A. P. Barker*, for defendants.

Opinion by STRANG, C.: This is a proceeding in *mandamus* to compel the chairman of the board of county commissioners and the county clerk of Wichita county to issue to

---

Waters v. Trovillo.

---

the plaintiffs the warrant of said county in the sum of \$6,000. The plaintiffs claim they entered into the following contract with the commissioners of Wichita county:

"THIS CONTRACT, Entered into this 5th day of September, 1888, by and between Waters, Chase & Tillotson, attorneys at law, of Topeka, Kas., parties of the first part, and the board of county commissioners of Wichita county, Kansas, parties of the second part, witnesseth: That the parties of the first part, for the consideration hereinafter named, are to take and prosecute such legal proceedings as may be necessary to relieve the said Wichita county of any obligations that may have been incurred on account of an attempt heretofore made by the commissioners of said county to subscribe \$80,000 to the capital stock of the Chicago, Kansas & Western Railroad Company, and also an attempt to subscribe \$55,000 to the capital stock of the Denver, Memphis & Atlantic Railroad Company, whereby it is claimed that said Wichita county should execute and deliver to said railroad companies the bonds of Wichita county for the amount so attempted to be subscribed; that in consideration of the services above set forth, the parties of the second part agree to pay to the parties of the first part all their necessary traveling expenses incurred in such service, and \$30,000, payable as follows: A retainer fee of \$6,000, to be paid at the regular meeting of the board of county commissioners of Wichita county in October; and \$12,000 when the courts finally decide that Wichita county is not liable on the attempted subscription to the capital stock of the Chicago, Kansas & Western Railroad Company; and \$12,000 when the courts finally decide that Wichita county is not liable on the attempted subscription to the capital stock of the Denver, Memphis & Atlantic Railroad Company.

"Done this 5th day of September, 1888, in the city of Leoti, Wichita county, Kansas.

(Signed)

WATERS, CHASE & TILLOTSON.

H. T. TROVILLO, *Chairman,*

W. S. TEMPLE,

CHAS. SINN,

} *County Commissioners  
of Wichita County.*

"Order to be made record of on commissioners' journal.

H. T. TROVILLO, *Chairman.*"

That afterward, on October 1, 1888, the board of county commissioners in session allowed the claim of the plaintiffs in

## Opinion of the Court.

the sum of \$6,000, that being the amount to be paid down on said contract as a retainer fee, and directed the clerk and chairman of the county board to issue the warrant of the county to the plaintiffs for that amount. The affidavit for the order of *mandamus* alleges that the said chairman and clerk refuse to issue said warrant, and plaintiffs ask this court, by its order, to require them to do so. The chairman of said board, answering, says he is ready to sign the warrant whenever prepared by the clerk of the board. The clerk answers and says, first, that the alleged contract is void because it was never made by the board of county commissioners, but was signed by the several commissioners each in the absence of the others, when not in session, and denies that the board ever ratified said contract; and, second, that said contract is void because the board of county commissioners had no power to make it. Counsel for the defendant clerk also says in his brief that the claim of the plaintiffs must be enforced by an action, and not by a proceeding in *mandamus*.

The briefs in this case show some misunderstanding between counsel as to what was introduced in evidence on the hearing of this case. It is the recollection of the commissioners that the county clerk produced and read in evidence the record of the board of county commissioners at their January, 1889, session, or so much of it as related to plaintiffs' claim, which record showed that the board, at its January session, reconsidered the action of the board at the former October session, in allowing the claim of the plaintiffs, and rejected said claim. This evidence would probably show, as was argued by counsel for the plaintiffs, a ratification by the board of commissioners, at the October meeting, of the contract made by the commissioners individually September 5, 1888, by the allowance at that time of the plaintiffs' claim for \$6,000, provided for by said contract. Upon the theory, then, that the record was introduced, the case occupies in law exactly the position plaintiffs claim it occupies in fact by agreement, so that the misunderstanding as to the evidence is not material; for if the evidence was introduced, and showed among other things

a ratification of the contract, it is the same in law as though it was agreed upon the trial of the case that the contract was ratified, as in either event the case turns upon the same question, to wit: Did the commissioners have power to make the contract in the case, or was the making of said contract *ultra vires*, and the contract itself void?

This case was before this court on a motion to quash the return of H. A. Platt, the county clerk, March 9, 1889. The question raised by that motion was practically identical with the question before the court now. The court denied the motion to quash at that time, in the following brief opinion: "Upon the authority of *Clough v. Hart*, 8 Kas. 487, the motion to quash will be denied." The consideration named in the contract under which the plaintiffs claim, for which the \$6,000 was to be paid, is legal services to be performed by the plaintiffs. There is nothing in the contract that shows whether such services were to be performed in the courts of Wichita county, or elsewhere. But as the contract was made in Wichita county, and simply provides for legal services for the county, without showing that such services are to be performed outside of Wichita county, the fair presumption is that they were to be performed within the county, and this presumption is supported by the fact that the legal services actually performed by the plaintiffs under the contract consisted in bringing certain suits in the district court of Wichita county. The law provides an officer whose duty it is to conduct legal proceedings in behalf of the several counties of Kansas, in the persons of the county attorneys of said counties. This court, in the case of *Clough v. Hart*, *supra*, used the following language:

"Where a written contract between a county and an individual shows upon its face that it was made by the county for the professional services of the individual as an attorney or counselor at law, which services are such as the law requires to be performed by the county attorney, such contract is *prima facie* void."

We think the contract in this case falls within the rule laid

down in that case, and that the writ now prayed for should be refused, upon the law of that case. (See also, *Morrill v. Douglass*, 14 Kas. 294.)

We recommend that the writ be refused.

By the Court: It is so ordered.

All the Justices concurring.

### THE STATE OF KANSAS v. W. O. BUSH.

47	201
52	527
47	201
82	386

**VOTERS—Registration—Compliance with Law.** A slight departure from some directory provision of the act relating to the registration of voters in cities, without any fraudulent intent on the part of the officer, and which in its nature and effect cannot injure any one or operate to interfere with or defeat the purpose of the act, is not punishable as a felony, or within the penalty described in § 15 of the act.

#### *Motion for Rehearing.*

PROSECUTION for improperly registering the name of a voter. The court below sustained the motion to quash the information, and discharged the defendant, *Bush*. *The State* appealed. This court, at its session in January, 1891, reversed the judgment of the district court of Butler county, and remanded the cause for further proceedings. (*The State v. Bush*, 45 Kas. 138, *et seq.*) In due time the defendant filed his motion for a rehearing, which the court overruled, at its session in October, 1891.

*E. N. Smith*, and *Clogston, Hamilton, Fuller & Cubbison*, for the motion.

*John N. Ives*, attorney general, *contra*.

The opinion of the court was delivered by

JOHNSTON, J.: Upon the original hearing, no argument or appearance in behalf of the defendant was made; but upon

---

The State v. Bush.

---

this application for a rehearing the defendant appears by his counsel and insists that the information filed against him is inadequate in its averments, and fatally defective in not charging a culpable intent. It is stated, in substance, that he was the city clerk of El Dorado, and that he unlawfully and feloniously registered J. N. Hanna as a qualified voter, when Hanna did not appear in person, or was not present in the office of the city clerk, giving his name, occupation, and place of residence, as the statute directs. It is stated that, at the hearing of the motion to quash, the county attorney informed the court "that there would be no effort made to show any fraudulent intent on the part of the defendant in the simple act of registering J. N. Hanna, who was at that time a resident, and otherwise a legal and qualified elector in the city of El Dorado, but who did not appear in person before said clerk on the day on which he was registered." It is also stated that the district court held that, unless "the defendant by his act intended to commit some wrong, either in registering a person not entitled to vote, or intending to injure or defraud a person with a right to vote out of his vote, or intending to injure or defraud some candidate before the election, that the defendant would not be guilty of violating the law;" and as none of these things were contended for by the prosecution, the motion to quash was sustained.

It is earnestly contended that it was not within the legislative intent to punish as for a felony every omission or failure of the officers to carry out the minute and minor details of the registration act, and that, although the prohibition of the act was general in its terms, it fairly embraced only the mischiefs which the enactment was intended to prevent. It is therefore urged that the information should contain statements showing a culpable intent on the part of the defendant to defeat the obvious purpose of the statute, or allegations of some acts or omissions of the defendant of a substantive character, necessarily resulting in the wrong or injury which the legislature intended to suppress. The writer hereof is now inclined to think that the allegations of the information are

## Opinion of the Court.

insufficient, but the majority of the court are of opinion that the language of the charge stating that the act was unlawfully and feloniously done characterizes it as a crime, and therefore the information is not so inadequate in statement as to be fatally defective. The court, however, does not decide, as counsel seem to think, that every departure from the letter of the statute comes within its prohibition and penalty, and therefore the hardships which counsel imagine will result from the enforcement of the act do not exist. It is true that the language of § 15 is sweeping in its terms, and, if construed with literal severity, would embrace the slightest departure from any direction or detail which the statute contains, however innocent and harmless the act or omission of the officer might be. It is evident from the provisions and penalty of the act that such was not the purpose of the legislature. The act is a general one, giving specific and minute directions and details as to the preparation for and the regulation of the registration of voters in cities of the first and second classes. Minute directions are given as to the various steps to be taken and the manner thereof, some of which are very important, while others are of less importance; and at the end of the chapter it is provided that if any officer shall neglect or refuse to perform any act required by the statute, and in the manner required by it, he shall be guilty of a felony, and punished by confinement and hard labor in the penitentiary, as well as to forfeit the office which he then holds. The legislature doubtless intended to impose upon the officers a faithful observance of the provisions of the act, with a view of carrying out its purposes; but it will hardly be contended that the legislature intended to visit so severe a punishment upon an officer free from any wrong intent, for some slight departure from an unimportant detail of the law, which does not and cannot operate to defeat its object. We may properly look at the mischief proposed to be remedied, and to some extent the severity of the penalty imposed, in determining the true legislative intent in framing the act.

Voters—registra-  
tion—com-  
pliance with  
law.

It has been held that the purpose of the registration act is



to preserve the purity of the ballot-box, by ascertaining in advance, by proper proofs, who are entitled to vote at an election, thus securing, ten days before the election, the full registry of all persons entitled to vote, which registry can be examined and scrutinized by any interested party. (*The State v. Butts*, 31 Kas. 537.) Any substantive act or omission of an officer which appears to operate to defeat this purpose comes within the prohibition and penalty of the statute, but a strict compliance with a minor detail that could have no such effect was not intended to be punished as a felony. For instance, the act provides that, on January 1st of each year, the mayor and council shall procure and open a poll-book for each ward in the city. Would the inadvertent omission to furnish a poll-book until the following day subject these officers to imprisonment in the state penitentiary? The statute further provides that the poll-books shall at all times be kept in the office of the city clerk. If the clerk should take one book out for repairs after office hours, and return it in time for the opening of business the next morning, would he be liable to a felon's punishment? Again, the act requires that the books shall be open at all times during the year, except for 10 days preceding the election; but it will not be contended that the clerk must keep them open during the night-time, or be held liable to the rigorous penalties of the act. This is the more apparent, for another section provides for registration during the usual office hours. If the clerk, as a matter of courtesy and accommodation, should remain in his office a short time beyond the usual office hours, and should then register legally-qualified voters, would he be held liable to the penalties of the law? He is required to enter the names of the persons registered in alphabetical order; but if he should, by mistake, fail to enter a name in that order, he would hardly be guilty of felony, although the work was not done in the manner provided in the act. It is also provided that no person shall be registered unless he appear in person at the city clerk's office and apply to be registered; but if a qualified voter who was an invalid was driven in a carriage to the city clerk's office, but was un-

## Separate Opinion.

able to enter there, and should call the city clerk out in the street, or should chance to meet him in the street and there apply to be registered, and the city clerk, knowing that he was unquestionably a qualified voter, should register him, would this deviation from the strict letter of the statute be within the severe penalties provided in § 15? We think not. These and many other like acts and omissions are within the letter of the statute, but manifestly the legislature did not contemplate that such acts or omissions should be punished as felonies. A departure from some directory provision, made without fraudulent intent, and which in its nature and effect cannot injure anyone or operate to defeat or interfere with the purpose of the act, cannot be regarded to have been in the mind of the legislature in prescribing the penalties of the act. Although such departure appears to be within the strict letter of the act, a consideration of the mischief intended to be prevented, the remedy proposed, and the punishment provided, indicate clearly that such was not the intention of the makers of the statute. It has already been held that, when the intention of the legislature can be discovered, it should be sensibly followed, although such interpretation may seem contrary to the letter of the statute. (*Intoxicating Liquor Cases*, 25 Kas. 751, 762.)

The motion for a rehearing will be denied.

HORTON, C. J., concurring.

VALENTINE, J.: I concur in overruling the motion for a rehearing, but I do not wish to express any opinion upon any matter not involved in the consideration of this question. The fundamental question to be considered is, whether the defendant's motion in the court below to quash the information should have been sustained or not; and as to when informations may be quashed and when not, see the case of *The State v. Morrison*, 46 Kas. 679; same case, 27 Pac. Rep. 133. The only substantial question now presented is, whether the information states a public offense as against the defendant or not. Or, in other words, the question is this: Where a crim-

inal information states and charges everything and all things necessary under the statutes to constitute a public offense, and states the same substantially and almost literally in the language of the statute defining the offense, and charges that the acts of the defendant constituting the offense were committed by him "unlawfully and feloniously," does such an information state a public offense or not? Or perhaps, in still other words, the question is this: May a person unlawfully and feloniously violate a criminal statute without being guilty of any offense? In the case of *Wong v. Astoria*, 13 Ore. 538, (same case, 11 Pac. Rep. 295,) it was held, that to allege that an act was done "willfully and unlawfully" was equivalent to alleging that it was done "knowingly." In the case of *Weinzorpflin v. The State*, 7 Blackf. 186, 195, it is said among other things, as follows:

"'Feloniously' is substituted for it [the word 'unlawfully'] in this indictment, and is not tantamount to it, but is a word of far more extensive criminal meaning. The act complained of could not have been feloniously, and not unlawfully, done."

In the case of *Carder v. The State*, 17 Ind. 307, it is said—

"That the word 'feloniously' in this connection in which it was used in the indictment was identical in its import with the word 'purposely.'"

In the case of *Commonwealth v. Adams*, 127 Mass. 15, 17, it is said:

"But the allegation that the defendant maliciously and feloniously incited and procured the principal to commit the felony *ex vi termini* imports that she acted with an unlawful intent."

In the case of *Allen v. The Inhabitants, etc.*, 3 Wilson [Eng.], 318, it is said as follows:

"Here he [the prosecutor] has alleged in his declaration, and proved at the trial to the satisfaction of the jury, that the same was committed and done *feloniously*; and that act, which was committed *feloniously*, was certainly done willfully, unlawfully, and maliciously; for doing an act *feloniously* is doing it *malò animo*, viz., with malice; therefore Serjeant Burland concluded

---

Separate Opinion.

---

that the declaration was perfectly right, and of that opinion was the whole court, and gave judgment for the plaintiff."

In Webster's International Dictionary it is said that the word "felonious" means "having the quality of a felony; malignant; malicious; villainous; perfidious; *in a legal sense, done with intent to commit a crime.*" The Encyclopædic Dictionary says that the word "felonious" means, in law, "of the nature of a felony; done with deliberate purpose to commit a crime;" and the word "feloniously" means, in law, "in a felonious manner; with deliberate intention to commit a crime." See, also, the Imperial Dictionary and the Century Dictionary, substantially to the same effect.

Under the foregoing authorities, and under the allegations of the information, the defendant did all that was necessary to be done, under the statutes, to constitute his acts a criminal offense; and as he did the same "unlawfully and feloniously," he did the same "with intent to commit a crime," (Webster's Int. Dict.,) or "with deliberate intention to commit a crime." (Encyc. Dict.) It would therefore seem that the information ought to be held to be sufficient. Can a person violate a criminal statute, "with deliberate intention to commit a crime," and still be innocent and blameless? Where a statute prohibits a thing and makes the doing of the same a criminal offense, but nevertheless a party does such thing, and does it "unlawfully and feloniously," or, in other words, does it "with the intent to commit a crime," is he still innocent and blameless? Will it be claimed that the statute in the present case is a bad law, and that the legislature has no right to pass a bad law, and therefore that the same should be annulled by the courts?

JOSEPH McNULTY *et al.* v. JOHN W. McNULTY.

**DEED**—*Ratification of Invalid Delivery.* Where the grantee has surreptitiously obtained possession of a deed duly acknowledged, but never lawfully delivered, such possession and invalid delivery may be ratified by the subsequent acts of the grantor, which show a clear recognition and acquiescence in the grantee's title to the land conveyed by such deed. *Held*, That the evidence and special findings of fact in this case show that the grantor ratified the act of the grantee in taking into his possession the deed of June 30, 1876; and that the conclusion of law, as found by the district court, that the grantor did not ratify such possession, is not warranted by the evidence and the special findings of fact.

*Error from Osage District Court.*

THE facts are substantially stated in the opinion.

*A. Smith Devenney*, for plaintiff in error.

*Isaac Farley*, and *Robt. C. Heizer*, for defendant in error.

Opinion by GREEN, C.: Christopher McNulty, a bachelor, owned the west half of the northwest quarter of section 25, in township 18, in range 16, in Osage county. On the 6th day of September, 1872, he conveyed this land to his brother, John W. McNulty, for the sum of \$500, and the grantee was placed in possession of the premises, and exercised acts of ownership over the same. It seems there were three brothers then living—John W., the defendant in error in this case, Christopher, the grantor in the deed named, and Joseph, one of the plaintiffs in error. On the 30th day of June, 1876, John W. McNulty and wife made a deed to the land in controversy to Christopher McNulty for the sum of \$500, which sum, it was claimed, was never paid. The grantor placed the deed in a bureau drawer in his own home, among his private papers, from which place it was taken several years afterward by the grantee, and on the 22d day of August, 1884, by him placed upon record without the knowledge or consent of the grantor. This action was brought on the 15th day of Decem-

## Opinion of the Court.

ber, 1887, by John W. McNulty, to set aside this deed, executed by him and his wife to Christopher McNulty, (which he insists was never delivered,) and a deed subsequently executed by Christopher to his brother Joseph, conveying the same land. The case was submitted to the court at the November term, 1888, and the following special findings of fact and conclusions of law were made:

## "SPECIAL FINDINGS.

"1. This action was instituted by John W. McNulty, plaintiff herein, against the said defendants herein, Joseph McNulty and wife, on the 15th day of December, 1887, in said court.

"2. Said plaintiff and said defendant Joseph McNulty are brothers; the former being a resident, with his family, of Osage county, Kansas, and the latter being a resident of Johnson county, Kansas, and is the head of a family.

"3. One Christopher, or 'Chris.' McNulty died in Johnson county, Kansas, on June 6, 1887, of consumption, at the residence of the said Joseph McNulty, who, as well as the plaintiff, was a brother of said decedent. The said deceased never having been married, he made his home from the year 1871 to date of his death, alternately, with his said brothers, John W. and Joseph, except when he was absent in California.

"4. Prior to September 6, 1872, said Chris. McNulty was the owner in fee of the west half ( $\frac{1}{2}$ ) of the northeast quarter ( $\frac{1}{4}$ ) of section 25, township 18, range 16, in Osage county, Kansas, and on that day he executed and delivered to plaintiff, John W. McNulty, a warranty deed for said land, which deed was duly recorded on the 20th of September, 1872. Said deed contained a recital of a consideration of \$500, and other than said recital there is no evidence of any consideration passing from said John W. McNulty to said Chris. McNulty for said land.

"5. In 1872, and for several years prior to that year, the said Chris. McNulty was engaged in business at Olathe, Kas., in company with one Charles Wagoner, and at the time said conveyance was made by said Chris. McNulty to said John W. McNulty the creditors of said firm of McNulty & Wagoner were pressing them for the payment of their debts, and said conveyance was made by said Chris. McNulty for the

purpose of putting said land beyond the reach of the creditors of said firm.

"6. Immediately after the execution of said deed to him, said John W. McNulty took possession of said land, and continued in the possession thereof, and in the full enjoyment of all rents and profits thereof, up to and including the year 1884, and paid the taxes thereon from 1873 up to 1883, both years inclusive, and the first half of the taxes of 1884.

"7. On the 30th day of June, 1876, said John W. McNulty, his wife joining with him, in the presence of said Chris. McNulty, executed a warranty deed reciting a consideration of \$500, conveying said land to said Chris. McNulty, which deed the said John W. McNulty, after the same was executed, retained in his own possession, and said deed was never, at any time, delivered by said John W. McNulty, or by any one for him or by his authority, to any one acting for him, and the said John W. McNulty never intended to deliver said deed to the said Chris. McNulty until the latter should pay to the former the consideration named in said deed.

"8. In the fall of 1883 said Chris. McNulty, who had been for several years in California, returned to Kansas, and spent the remainder of that year and a portion of 1884 at said John W. McNulty's, and while living there, without the knowledge or consent of said John W. McNulty, he took said deed from among the private papers of the said John W. McNulty, and without any authority from him, on the 22d day of August, 1884, filed it for record in the office of the register of deeds of Osage county, state of Kansas, and said John W. McNulty had no knowledge that said deed had come into the possession of said Chris. McNulty until several weeks after it was recorded, and then only by learning that it had been recorded.

"9. Chris. McNulty himself, with the full knowledge of the said John W. McNulty, and without objection on his part, rented said land for the year 1885 to John W. McNulty, a son of said John W., who was living with his father, and took in payment of the rent a note from said John McNulty for \$140; and afterward, upon leaving for California, he left said note with the said John W. McNulty, as his agent, to collect the same, and said John W. McNulty did collect said note, and out of the proceeds thereof paid the taxes on said land for the last half of 1884, and the first half of 1885, in the name of said Chris. McNulty, and sent the balance to said Chris. McNulty to California.

---

Opinion of the Court.

---

"10. In the year 1885, the said Chris. McNulty put the agency of said lands for the leasing thereof and collecting of rent for the year 1885 in the hands of one Peter Chevalier, with the knowledge and consent of said John W. McNulty; but no rents were collected for that year by the said Chris. McNulty or his agent, the tenant to whom said Chevalier rented said land having appropriated the crops and paid no rent to any person.

"11. In the year 1887, the said John W. McNulty rented said land as his own to his son Chris. for one-third of the crop, and that part of the rent share of the crops raised by said defendant was by him delivered to his father, and a part of said rent share was delivered by said tenant, with the knowledge of said John W. McNulty, to defendant Joseph McNulty.

"12. In the spring of 1887, said Chris. McNulty returned from California, and on the 25th day of March, 1887, he executed and delivered to said Joseph McNulty a warranty deed for said land, in which there is recited a consideration of \$800, which deed was duly recorded on the 29th day of March, 1887. The consideration was paid by said Joseph McNulty for said land, and at the time said deed was delivered to him by said Chris. McNulty he knew that said John W. McNulty had never delivered said deed of June 30, 1876, unto said Chris. McNulty, and also knew how the latter had obtained possession of said deed. Said Joseph McNulty paid the last half of the taxes of 1885 on said land, and also the taxes for 1886 and 1887.

"13. When said Chris. McNulty returned from California in the spring of 1887, he held a note for \$1,000, dated April 29, 1884, executed to him by said John W. McNulty; and some time after his return, and a short time before his death, John W. McNulty visited him at the residence of said Joseph McNulty, and while there the said Chris. McNulty surrendered and gave up the said note to said John W. McNulty.

"14. At a period between the date of the deed from John W. McNulty and wife to Chris. McNulty for the lands in controversy and the date of acquiring possession of said deed by Chris. McNulty, the said John W. McNulty gave a mortgage upon said lands and tenements for the sum of \$400, which said mortgage has not been paid, nor has any portion thereof been paid; and that said mortgage was so given without the consent or knowledge of said Chris. McNulty at the time it was given."



---

McNulty v. McNulty.

---

## "CONCLUSIONS OF LAW.

"1. By the deed of September 5, 1872, so far as the parties to this case are concerned, John W. McNulty, the plaintiff, acquired a perfect legal title to the lands in controversy in this action.

"2. Said John W. McNulty was not divested of the title so acquired by the deed of June 30, 1876, nor by the record of said deed.

"3. Said John W. McNulty did not ratify the act of said Chris. McNulty in taking into his possession and causing to be recorded the deed of June 30, 1876.

"4. The deed of June 30, 1876, from John W. McNulty to Chris. McNulty, and the deed of March 28, 1887, from Chris. McNulty to Joseph McNulty, the defendant, are null and void, and the plaintiff is entitled to have them so declared by decree in this action.

"5. The plaintiff is entitled to recover his costs in this action."

The vital question presented in this case is whether the defendant in error ratified the act of his brother Christopher McNulty in surreptitiously taking the deed, executed on the 30th day of June, 1876, from the bureau drawer where the grantor had placed it, and delivering the same to the register of deeds of Osage county for record, on the 22d day of August, 1884. It is evident from the testimony and the findings of the trial court that there was no delivery of the deed by the grantor. The delivery of a deed, being an essential requisite to effectually pass the title to real estate, the title to the land in controversy must have continued in the defendant in error, unless there was a subsequent ratification by him of the act of his brother in taking the deed without his knowledge. While a deed thus obtained is void, and possesses no greater validity than it would have if forged, still it may be ratified by the grantor after he has full knowledge of all the facts, by any words and acts of his which show a clear intention on his part that the deed should be regarded as properly delivered, and that the same conveyed the title to the property. (*Tucker v. Allen*, 16 Kas. 312.) The district court found as a conclusion of law that John W. McNulty did not ratify that act of his

---

Opinion of the Court.

---

brother in taking into his possession and causing to be recorded the deed of June 30, 1876. The correctness of this conclusion of law is challenged by the plaintiffs in error, who contend that it is not warranted by the evidence and the special findings of fact. We have carefully examined the facts bearing upon the question of ratification by the plaintiff below. It must be remembered that the transaction was between brothers, and there were some irreconcilable statements made by each one of them, but the following undisputed facts may be gathered from all of the evidence: The plaintiff below learned in a few weeks after his brother Christopher took the deed that it had been placed upon record; the matter was afterward talked over between him and his brother Joseph, and it was known by each how the deed was obtained. The next year after the deed had been obtained the land was rented to a son of the plaintiff below, and a note for \$140 for the rent given, payable to the grantee, Christopher McNulty; and this note was delivered to the grantor for collection and was by him collected, and a portion of the amount was used in paying the taxes, in the name of the grantee, and the balance was remitted to him in California by his brother. In the year 1886 the land was rented, with the knowledge of the grantor, to a German, by an agent of the grantee. The plaintiff below acknowledged that his brother Christopher took the agency of this land from him and rented it to some one else for this year. One witness, who appears not to be related to the parties, testified that he rented the farm in 1887, for the year 1888; that he saw that some one had taken possession of the place in the early part of March of the latter year; that he went around and saw John W. McNulty, who informed him that his son was going to farm the place, and when informed that he had rented the place from Joseph McNulty, John W. McNulty replied that he had permission from his brother Christopher the year previous to rent the place, and had rented it to his son for one year, with permission to have it as long as he wanted it, and if he did not get written notice from Joseph he was going to hold over. Subsequently John W.

---

McNulty v. McNulty.

---

McNulty stated to him that his son Christopher was going to hold the place; that Christopher's third was as good as that of the witness to Joseph; that if a notice had been given he would have given it up. It appears that John W. visited his brother Christopher in 1887, a short time before his death, and was presented with a note of \$1,000, and was informed by Joseph that Christopher had deeded him the land in controversy; and to this John W. made no objection. The plaintiff in error paid the last half of the taxes for 1885 and the taxes for 1886 and 1887.

Upon this evidence, the district court made the special findings of fact, *supra*. As a conclusion of law the court found, that John W. McNulty did not ratify the act of his brother in taking into his possession and causing to be recorded the deed of June 30, 1876. In this we think the court erred. There was, in our judgment, such a state of facts as showed a ratification. The court found that Christopher McNulty, with the knowledge of his brother John W., and without objection upon his part, rented the land in controversy for the year 1885, and took a note for \$140, which he left with his brother, who afterward collected the note and accounted to his brother for the proceeds. The evidence upon which this finding is based indicates, to our minds, that there was a recognition upon the part of John W. McNulty of his brother's right to the land. He received the rents for his brother, and thus recognized his title, which could only come through the delivery of the deed of June 30, 1876. Having once acknowledged and recognized the title of his brother, we do not think he could afterward be heard to say that his conduct and statements were the result of a doubt in his mind as to his legal rights. The grantor cannot recognize the possession of a deed as valid for some purposes, and then disclaim it as being nugatory for all others. (*Cotton v. Gregory*, 10 Neb. 125.) John W. knew that his brother had obtained possession of the deed and placed it upon record, and for three years thereafter he recognized his brother's title to the land. It has become an axiomatic rule of law, which requires no

Deed—ratifica-  
tion of invalid  
delivery.

---

Opinion of the Court.

---

argumentative demonstration or authority to support it, that that to which a person assents is not esteemed in law an injury. We think it clear from the evidence that there was no delivery of the deed of June 30, 1876, in the first instance, but we base our decision upon the fundamental truth that a delivery may be made good by a subsequent assent, though originally invalid for the want of it, upon the well-settled principle that a subsequent ratification may have a retrospective effect. (3 Washb. Real Prop. 305; *Holbrook v. Chamberlin*, 116 Mass. 155.) While it is true that where possession has been obtained surreptitiously of a deed which has never been delivered, it requires an express ratification, or at least an acquiescence, after knowledge of all the facts, of such a character as would create a presumption of an express ratification, to give force and effect to the deed; (1 Devl. Deeds, § 268;) still we are of the opinion that the evidence before the district court indicated such a ratification and acquiescence upon the part of the plaintiff below as to bind him, and to show that he recognized his brother's title after he had full knowledge of all the facts.

We think the second and third conclusions of law were not authorized by the evidence, or supported by the special findings of fact, and therefore recommend a reversal of the judgment, and that a new trial be granted.

By the Court: It is so ordered.

All the Justices concurring.

47	216
163	806

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY *et al.*  
v. J. B. COOK *et al.*

**RAILROAD LAND GRANT—Location of Route.** By act of congress of July 26, 1866, the Union Pacific Railway Company, southern branch, afterward the M. K. & T. Railway Company, received a grant of right-of-way for its road 200 feet wide through the reserved and ceded lands of the government. Prior to December 24, 1867, the latter company surveyed its line of road, and filed its map designating its route, with the secretary of the interior. October 9, 1869, one Hodges, one of the grantors of the defendant J. B. Cook, purchased of the government the land in dispute. Afterward, in May and June, 1870, the railway company changed the line of its road and built it across the land in dispute, the original location not having touched the quarter-section to which the land in question belongs. *Held*, That by the survey of its line, and the filing of its map designating the route of its road, the company exercised its right under its grant, and could not reclaim it two years and a half afterward, on changing its line of road, so as to affect the rights of Hodges, or his grantees.

*Error from Labette District Court.*

EJECTMENT. The case is stated in the opinion.

*T. N. Sedgwick*, for plaintiffs in error.

*Case & Glasse*, for defendants in error.

Opinion by STRANG, C.: Action of ejectment to recover possession of the following-described real property, situated in Labette county, Kansas, to wit: Commencing on the north line of Main street, in the city of Chetopa, at a point 50 feet west of the center of the main track of the Missouri, Kansas & Texas Railway; thence north 100 feet, on a parallel with the center of the main track of said railway; thence west 50 feet; thence south on a line parallel with the main line of said railway 100 feet, to the north line of Main street; thence east along the north line of Main street to the place of beginning, being a portion of the land claimed by the plaintiffs as a right-of-way in the city of Chetopa. The defendants filed a joint answer, denying that the plaintiffs had any legal estate in the

---

Opinion of the Court.

---

land described, or a right to recover the possession thereof. At the February term, 1889, the case was tried by the court without a jury, on the following agreed statement of facts:

"It is hereby stipulated and agreed that, upon the trial of the above-entitled action, the following facts shall be admitted:

"1. The Missouri, Kansas & Texas Railway Company was, on the 25th day of September, 1865, duly organized as a corporation, under the name of the Union Pacific Railway Company, southern branch, and on the 3d day of February, 1870, its name was duly changed, and made The Missouri, Kansas & Texas Railway Company; and it is the railway company referred to in the act of congress approved July 26, 1866, entitled 'An act granting lands to the state of Kansas to aid in the construction of a southern branch of the Union Pacific railway and telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas.'

"2. The acceptance of the terms, conditions and impositions of said act by the said Union Pacific Railway Company, southern branch, was signified in writing, under the corporate seal of said company, duly executed, pursuant to the direction of its board of directors first had and obtained; which acceptance was made and deposited with the secretary of the interior within one year after the passage of this act.

"3. The land in the petition described is a part of the lands known as the Osage ceded lands, granted to the United States by the treaty between the United States of America and the Great and Little Osage Indians, proclaimed January 21, 1867.

"4. Prior to the 24th day of December, 1867, a line was surveyed for the route of said railroad by G. M. Walker, then chief engineer of said company, which was the line from which the lands mentioned in stipulation No. 7, herein, were withdrawn from the market, but that line did not touch the southwest quarter of section 34, township 34, range 21, which includes the land described in plaintiffs' petition in said case; and afterward, and between May 1, 1870, and June 6, 1870, said company located its road on the line where now operated, and built same in substantial compliance with said act of congress; but the route of said road, on its present location, has never been approved by the president of the United States, unless such approval is shown by the other facts herein admitted.

"5. The premises in plaintiffs' petition demanded lie

wholly within 100 feet of the center line of the main track of the railway so built and constructed as aforesaid, the center line of said main track being the center of the right-of-way of railway company.

"6. On the 1st day of September, 1880, the said Missouri, Kansas & Texas Railway Company leased said railway to said Missouri Pacific Railway Company, which has since possessed and operated the same as such lessee.

"7. Upon the completion of said railway through said Osage ceded lands, the president of the United States issued to said Missouri, Kansas & Texas Railway Company patents, under said act of congress approved July 26, 1866, for the alternate sections of land designated by odd numbers, to the extent of five alternate sections per mile on each side of said railroad, which are the same patents set aside in the case of *M. K. & T. Rly. Co. v. United States*, 92 U. S. Rep. 645.

"8. The quarter-section including the land in question was entered and purchased by one W. A. Hodges from the government of the United States on October 9, 1869, and a certificate in due form was on that day, by the proper officers, issued to him therefor; and thereafter, and on November 1, 1870, a patent in due form was issued therefor, pursuant to the said entry, by the government of the United States to said patentee, Hodges, which was duly signed and executed, and a perfect chain of title from said Hodges, patentee, now runs to and terminates in said defendant J. B. Cook, and he is the owner thereof, unless the same is owned by the plaintiffs, by virtue of the facts herein admitted and the law governing the same; except Printz is in possession of the premises in controversy as the tenant of defendant Cook.

"9. None of the land in dispute lies within 50 feet of the line of the center of the main track of said railroad, nor do defendants claim any part of the strip of land within 50 feet of either side of the center of said track. The plaintiffs, at the time of constructing said road, erected a depot building on its right-of-way, and the land on which said building stands is adjacent to the land in dispute; which said depot has been used all the time since its erection for the purpose of receiving freight and passengers for shipment. Nor do defendants claim any ground on which any side-tracks of said railroad are now located."

On the facts as above set forth, the court found for the defendants and entered judgment accordingly. A motion for

---

Opinion of the Court.

---

new trial was overruled. The plaintiffs demanded, on the journal, another trial. The first judgment was set aside, and another trial was had on the same facts, and a second judgment for the defendants was entered, followed by another motion for new trial, which was overruled.

The claim of the plaintiffs to the land in dispute is based upon a right-of-way grant contained in an act of congress of July 26, 1866. The first section of said act gives the railroad company named therein a right-of-way through the reserved and ceded lands of the government 200 feet wide, while by the sixth section the road is granted a right-of-way through the public lands only 100 feet wide. The land in question was a part of the lands reserved for the Osage Indians, at the time of the passage of the act under which plaintiffs' claim is made, but were ceded to the government January 21, 1867. The plaintiffs claim that the grant to the company of the right-of-way was a present grant, and took effect immediately upon passage of the act. We agree with the counsel for the plaintiffs that the grant was a present one, and that, so far as the grant itself is concerned, or the right of the company to locate and have a right-of-way for its road 200 feet wide through reserved or ceded lands, it took effect immediately. But we understand that until the grantee exercises the right secured by the act, by definitely locating its road, the grant is afloat, and while the grantee has a vested right in the grant to the extent of a right to locate its road and claim 200 feet for its right-of-way through reserved or ceded lands, such right does not attach to any particular tract of land until the road is located, and to that extent, and in that sense, the grantee has no vested right in any particular piece of land for a right-of-way until the road is definitely located. The grantee has a vested right, a fixed and indefeasible right, from the passage of the act, to a strip of land 200 feet wide through the reserved and ceded lands of the government for a right-of-way, which shall take effect and attach to the land on the location of its road, but no vested right in any particular piece of land until the location of its road. When, however, the location is made and the



grant attaches, it relates back to the inception of the grant, the passage of the act containing it. We also understand that when the grantee elects to attach his grant to any particular tract of land by the definite location of its road, it has claimed its grant, and exhausted its right thereunder, and cannot reclaim it elsewhere.

Location of  
route; not re-  
claimed,  
when.

"This case stands thus: The incorporators had the power to locate and construct a railroad. They could exercise this right but once without further grant. To accomplish this object, a most important attribute of sovereignty was bestowed on them by the legislature—the extraordinary reserve power of subjecting the property of private individuals to public use. If it were intended that this should be a continuing power, one that might be exercised, and again reexercised again and again, as often as might suit the convenience of this company, the legislature should have so declared in express terms. They have not done so." (*Moorhead v. L. M. Rld. Co.*, 17 Ohio, 351.)

"This extent of country is not all appropriated to the use of the road, but only so much as may be necessary for a track; its right to it is simply one of selection; and when it has made its selection, its right over all the other territory ceases. This principle is distinctly decided in the case of *Moorhead v. L. M. Rld. Co.*" (*L. M. Rld. Co. v. Naylor*, 2 Ohio St. 238.)

When did the plaintiff definitely locate its road, so that its grant of the right-of-way attached? It claims it located it when it built it where it now is in 1870, and not before, while the defendants claim the company definitely located its road prior to December 24, 1867, on the Walker survey, which location did not touch the quarter-section of land to which the piece in dispute belonged. We are of the opinion that the defendants are right in their contention that the company definitely located the line of its road prior to December 24, 1867, and that by so doing it exhausted its rights under the grant contained in the act of July 26, 1866, at any rate so far as the intervening adverse rights of third parties are concerned; and as the defendant Cook's grantors purchased the land after the 24th of December, 1867, and before May, 1870, to wit, October 9, 1869, he had rights in the land prior to 1870 that could not be affected by the relocation of the plaintiff's road. The

---

Opinion of the Court.

---

survey of the plaintiff's road by Walker was followed by the company filing a map with the secretary of the interior showing the route of its road, and asking that the lands along its line thus established be withdrawn from the market, until the company had selected its lands. This we think constituted a definite location of its road by the company, and an exercise of its grant, and when thereafter it changed its route, its location was subject to the rights before then obtained by Hodges in the land in dispute. The fourth section of the act of July 26, 1866, among other things states: "That as soon as said company shall file with the secretary of the interior maps of its line, describing the route thereof, it shall be the duty of the secretary to withdraw from the market the land granted by this act." This section confers upon the grantee the right to file with the interior department a map describing the route of its road, and made it the duty of the secretary of said department, when said map was filed, to withdraw from the market the lands granted by the act.

It is said by the plaintiffs that the only object in filing the map was to secure the withdrawal of the lands granted by the act, and that filing of the map had nothing to do with the right-of-way. It is true the withdrawal of the lands granted was the object to be obtained by the filing of the map, but it is also true that that object could not be attained except by filing the map as evidence of the location of the line of road. And the company, having filed it as evidence of the location of its road for that purpose, cannot afterward, and after it has secured that purpose, say that is not evidence of the location of its road, for the purpose of enabling it to relocate its right-of-way.

"We are of the opinion that the position of the claimant is the correct one. The route must be considered as definitely fixed when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the secretary of the interior, the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of the different lines. But when a route is adopted by the company, and a

---

M. K. & T. Rly. Co. v. Cook.

---

map designating it is filed by the company with the secretary of the interior and accepted by that officer, the route is established; it is, in the language of the act, 'definitely fixed,' and cannot be the subject of future change so as to affect the grant, except on legislative consent. No further action of the company is required to establish the route." (*Van Wyck v. Knevals*, 106 U. S. 360.)

"For we are of the opinion that, under this grant, as under many other grants containing the same words, or words to same purport, the act which fixes the time of the definite location is the act of filing the map or plat of the line in the office of the commissioner of the general land office. . . . Until then many rights to the lands along which the road finally runs may attach, which will be paramount to that of the company building the road. After this no such right can attach, because the right of the company becomes by that act vested. . . . It selects for itself the precise line on which the road is to be built, and it is by law bound to report its action by filing its map with the commissioner, or rather in his office. The line is then fixed. The company cannot alter it so as to affect the rights of any other party." (*Railway Co. v. Dunmeyer*, 113 U. S. 629.)

Without looking into the question raised by the statute of limitations, we recommend that the judgment of the district court be affirmed.

By the Court: It is so ordered.

All the Justices concurring.

D. W. NAILL *et al.* v. THE KANSAS FARMERS' FIRE  
INSURANCE COMPANY.

47	223
49	727

1. **MUTUAL FIRE INSURANCE—Assessments—Separate Classes.** Chapter 111, Laws of 1875, (Comp. Laws of 1879, ch. 50a,) provides that the business of each class of a mutual fire insurance company must be conducted separately from the other, and that in no case shall an assessment be made upon the premium notes of one class to pay the losses or expenses of the other. The statute provides also "that the goods, wares, etc., contained in buildings used for merchandise, must be insured in the second, not the first, class." *Held*, That where one insures with knowledge of the above requirements, and the policy shows upon its face that it was issued as "class No. 2," a general judgment rendered on such a policy cannot be enforced against property expressly devoted to the payment of losses on property of the first class, but may, however, be enforced against any other property.
2. **EXECUTION—Injunction.** Where an execution against an insurance company is directed to the sheriff of another county, who attempts to levy on property which is exempt under chapter 111, Laws of 1875, (Comp. Laws of 1879, ch. 50a,) the company, having its place of business in the same county, may apply to the court of that county to prevent the unlawful sale, and is not obliged to proceed in the court from which the execution issued.

*Motion for Re-rehearing.*

THE material facts are stated in *Insurance Co. v. Amick*, 45 Kas. 74, 738, and in the opinion, *infra*, filed at the session of the court in October, 1891.

*F. A. Waddle*, for the motion.

*Stambaugh, Hurd & Dewey*, contra.

*Per Curiam*: Mrs. Lydia A. Amick obtained a policy of insurance for \$2,000 on the 7th day of November, 1883, of the Kansas Farmers' Mutual Fire Insurance Company, which was organized at Abilene, in this state, in 1882, under the provisions of chapter 111, Laws of 1875. The policy was to be in force from November 7, 1883, at noon, to the 7th of February, 1884. The premium was \$10, and was paid in cash. Of the insurance, \$1,300 was upon merchandise, consisting of dry goods,

## Naill v. Insurance Co.

notions, hats and caps, etc., in a one-story frame building on lots 33 and 35, in block 9, in Ottawa, in this state, and \$700 on household furniture, family apparel, books, music, etc., in the same building. Under the provisions of chapter 111, two classes of policies were issued by the company, one denominated "class No. 1," and the other "class No. 2." The business of each class is required by the statute to be conducted separately and independently of the other, and the statute specifically provides that "in no case shall an assessment be made by the company or association upon the premium notes of one class to pay the losses or expenses of the other class." (Ch. 111, §1, subdiv. 2.) The policy accepted by Mrs. Amick had clearly and plainly written upon its face "Class No. 2." There was also indorsed upon the back of the policy the letters and figures "Class No. 2." All the persons who in 1883 accepted policies from the insurance company in class No. 2 knew, or ought to have known, if they acted prudently, that class No. 2 was not in a good financial condition. From the insurance report of the state for 1884, the true condition of class No. 2, for 1883, is shown, as follows:

## MEMBERS.

Number of members added during the year.....	261
Number of members who have withdrawn, or whose policies have been canceled, during the year.....	29
Number of members belonging to the company December 31, 1883,	232

## RESOURCES.

Amount of premium or deposit notes in force December 31, 1883.....	\$1,665 19
Amount of all other resources, viz., premiums in course of collection.....	823 49
Total amount of resources.....	\$2,488 68

## EXPENDITURES.

Amount paid for losses occurring during the year.....	\$30 62
Amount paid to agents .....	505 65
All other expenditures during the year, viz.:	
Express.....	\$37 30
Postage and telegraphing.....	19 04
Books, blanks, and stationery .....	323 15
Reinsurance.....	184 00
General agent's salary and expense .....	600 00
Total.....	1,163 49
Total expenditures during the year.....	\$1,699 76

## Decision by the Court.

So it appears from the records of the company and the official statement of the superintendent of insurance for the state, that in 1883 the total amount of resources for class No. 2 was \$2,488.68, and that the expenditures for said class No. 2 for that year were \$1,699.76. The persons having insurance in class No. 2, in 1883, had no other notes, funds or resources to look to for the collection of their claims than the \$2,488.68, unless other notes were executed, or other funds collected, or some other thing done after that date. The condition of class No. 1, in 1883, was much better. The amount of premium notes in force in that class on December 31, 1883, was \$65,838.23. But, of course, the insurers in class No. 2, under the statute, had no right to expect that the \$65,838.23 of premium notes given by insurers in class No. 1, and expressly devoted by the statute to pay the losses and expenses of class No. 1, could be assessed, used or levied upon to pay the risks in class No. 2. The statute prohibits this. On the 27th of December, 1883, a fire occurred, destroying a part of the property insured by Mrs. Amick. On the 23d of December, 1884, she brought her action upon the policy of insurance of the date of the 7th of November, 1883, and attached to her petition a copy of the policy, which showed upon its face that it was issued under the provisions of chapter 111, as "class No. 2." Subsequently, judgment was rendered in favor of Mrs. Amick and against the insurance company, and other proceedings were thereafter had, as stated in the opinions already filed. (37 Kas. 73; 45 id. 74, 738.)

In overruling the motion for a further hearing, it is only necessary to repeat some of the things already stated in the opinion of June 6, 1891. In the first place, Mrs. Amick accepted her policy of insurance with full knowledge of the provisions of chapter 111, Laws of 1875, and she cannot now be heard to say that she did not understand the terms of her policy, or the conditions under which it was issued. She had her property insured in the second, not the first, class. The statute expressly prescribes that "the goods, wares, etc., contained in buildings used for merchandise must be insured in

the second, not the first, class." Mrs. Amick knew at the time of accepting her policy that the business of each class was conducted separately and independently of the other. She paid her money for her insurance, but she knew at the time of making the payment that the premium notes given by the company for insurance of the first class could not be assessed or used to pay the losses in the second class. All that we decided in the opinion handed down was, that—

"Under the provisions of chapter 111, Laws of 1875, (ch. 50a, Comp. Laws of 1879,) the business of each class of a mutual fire insurance company must be conducted separately and independently of the other, and in no case shall an assessment be made by the company or association upon the premium notes of one class to pay the losses or expenses of the other.

"A general judgment, rendered upon a policy of insurance on property of the second class only, issued on November 7, 1883, by a mutual fire insurance company, under the provisions of chapter 111, Laws of 1875, (ch. 50a, Comp. Laws of 1879,) cannot be collected from the property expressly devoted by the statute to the payment of losses by the company on property of the first class." (45 Kas. 738.)

We held then, as we hold now, that the general judgment may be and can be enforced against any and all of the property of the insurance company which is not expressly exempt by statute. We never held, and never intend to hold, that the execution could not be levied upon the general property of the insurance company subject to any execution. If the insurance company has money in its treasury, has office furniture, books, papers, real estate, or other property subject to execution, the general judgment may be enforced against it. The property that we said could not be levied upon to pay the judgment in this case was premium notes or other like funds, expressly devoted by the statute for the protection of the insurers in the first class. As the statute expressly forbids any assessment to be made upon the premium notes of one class to pay the losses of the other class, we held before, and now hold, that the premium notes of the first class are exempted by the statute from being used, levied upon or sold to pay the losses or expenses of the second class. If the insurance company

## Decision by the Court.

could not assess the premium notes of the first class to pay the losses or expenses of the second class, it could not use or sell said notes for such an unlawful purpose. In brief, it could not divert the premium notes of the first-class insurers, or the proceeds thereof, or any moneys in the treasury therefrom, for the losses or expenses of the second-class insurers. If it could not do so directly, on account of the prohibition of the statute, it could not evade the law by indirectly doing the same thing through a judgment against it upon a default, or by any insufficient answer, where the petition in the court shows the judgment was obtained upon a policy issued by the insurance company in the second class only. The courts are not eager to assist insurance companies in violating the provisions of the statute under which they are authorized to transact business. We never intimated, in the slightest manner, that the original judgment was to be modified, changed, or vacated, or that it could not be enforced against property subject to execution.

When the learned district judge of Franklin county, on the 13th day of August, 1888, appointed D. W. Naill as receiver in this case, he fully recognized the principle announced in the opinion of June 6, 1891, and reiterated here, that the premium notes of the first class could not be assessed or used to pay a loss in the second class. The order appointing the receiver recites, among other things, that "If said defendant has not sufficient cash to satisfy said judgment, with interest and costs, then it is ordered that said defendant deliver to said sheriff any notes, bonds, bills or assets (other than premium notes) sufficient to satisfy said judgment, interest, and costs," etc. We affirmed the appointment of the receiver, but extended the order of the district judge so as to protect, not only the premium notes, but any other like funds (if there be any such) of the insurers expressly devoted by the statute to pay the losses of the first class. If a general judgment is rendered against a debtor, his exempt property cannot be taken or sold upon an execution issued on such a judgment, whether he answered the original petition or not. (*Sproul v. National Bank*, 22 Kas. 336; *In re Jones*, 2 Dill. 343; *Reed v. Umbar-*



ger, 11 Kas. 206; *Robinson v. Wilson*, 15 id. 595; *Rasure v. Hart*, 18 id. 340.) If property is specifically appropriated by the statute for the use or payment of a certain class of claims or judgments only, it cannot be used against the objection of the debtor, for the payment of every judgment. Such property is exempt, excepting for the purposes expressly prescribed by the statute.

A homestead may be sold upon a judgment for the purchase-money thereof, or for the erection of improvements thereon, but a general judgment, obtained even upon default, cannot be enforced against a homestead if the debtor object. Certain personal property, owned by the head of the family, is exempt under the statute against a general judgment, but not against a judgment rendered for the wages of a clerk, mechanic, or servant. If a judgment is rendered in the district court of Franklin county, and executions thereon are issued from that court to the sheriff of Dickinson county, the sheriff of the last-mentioned county cannot lawfully levy and sell the exempt property of the debtor in Dickinson county, whether it be exempt under the statute of the state or under the federal statute as a homestead, or as money due or to become due to the debtor as a pensioner; and while a sheriff cannot, in any case, upon an execution in his hands, allow any new defense or modify any judgment, he cannot sell any property of the debtor which is exempt by the state or federal statutes. If the sheriff of Dickinson county, on an execution issued upon a valid judgment in Franklin county, attempts to sell property exempted to the debtor under the state or federal statutes, the debtor residing in Dickinson county may apply to the district court of his own county, where the property is situated, to prevent the unlawful sale. He is not compelled to commence such litigation in Franklin county, or in a court beyond the limits of his own county; therefore, while "a judgment is the final determination of the rights of the parties in an action," the judgment never can be, and never was intended to be, enforced against property of the debtor which the state or federal statute forbids being applied to the payment of the claim or

---

Decision by the Court.

---

judgment. The legislature has the same power to exempt the property of a corporation from levy under a judgment that it has to exempt the personal or real property of an individual; and a judgment cannot be enforced in the one case against the exempted property any more than it can be enforced in the other case. Whether the provisions of chapter 111, Laws of 1875, are wise or not, we are not called upon to say. If the legislature has said that the premium notes of an insurance company given by persons belonging to the first class, and similar funds, shall not be used to pay the losses of the second class, the letter of the statute must control, and we cannot wipe out the exemption by judicial construction. If it be true, as asserted by counsel for Mrs. Amick, that the insurance company is not doing any business of the first class, or if it has any property—real, personal, or mixed—not expressly devoted by the statute to the payment of losses of the first class only, then, of course, the original judgment may be enforced against all such property. Of course, all property not exempt is subject to levy and sale. We repeat what we said upon the former rehearing:

“If any property, assets or funds belonging to the second class at the date of the policy issued to Lydia A. Amick, or at the date of the fire, or at any other time, have been improperly or wrongfully transferred by the officers of the insurance company from the second class to the first class, to evade the payment of any judgment, debt, or other claim, such transfer will not prevent the collection of the judgment from such property, assets, or funds. Again, if the officers of the insurance company have concealed or secreted any of the property, assets or funds of the second class in the business of the first class, such property will also be subject to the payment of this judgment. Further, if the officers of the insurance company have covered up, by reorganization or any other change, any of the property, assets or funds which belong, or ought to belong, to the second class, or which in any possible way can be used, under the provisions of the statute, to pay the losses of the second class, such property is also subject to the payment of the general judgment.” (45 Kas. 741.)

In case No. 5491, we affirmed the appointment of the receiver, but directed that he should not take possession or con-

trol of the premium notes given by persons insured in the first class only, or any other notes or funds expressly devoted by the statute to the payment of the losses in the first class. It might be beneficial for the receiver to ascertain what has become of the premium notes of the second class in force on December 31, 1883. If, in January, 1884, the insurance company ceased to do second-class business, still the premium notes in force in that class on December 31, 1883, until legally exhausted, could be used to pay the loss of Mrs. Amick, and the company could not, to the prejudice of her rights, or in violation of the statute, return to other insurers, or give to any other company these notes, or the proceeds thereof, or in any way divert them or any part of them from the payment of the loss of Mrs. Amick. In case No. 7017, the injunction was continued, excepting it was ordered to have no application to property not exempt from levy and sale.

The motion for a further rehearing will be overruled.

HORTON, C. J., and JOHNSTON, J., concurring.

VALENTINE J.: This case has been in this court at different times from 1887 up to the present time: *Insurance Co. v. Amick*, 37 Kas. 73; same case, 14 Pac. Rep. 454; *Insurance Co. v. Amick*, 45 Kas. 74; same case, 25 Pac. Rep. 211; *Insurance Co. v. Amick*, and *Naill v. Insurance Co.*, 45 Kas. 738; same case, 26 Pac. Rep. 944. The last decision rendered by this court, on June 6, 1891, in the above case of Naill and Mrs. Amick against the Kansas Farmers' Fire Insurance Company, was against Mrs. Amick and in favor of the insurance company; and this was the first decision rendered by this court against Mrs. Amick, and she, with her co-defendant, Naill, now moves for a rehearing. In addition to the facts already stated in the former opinions delivered in the above cases by myself, I would state the following: The insurance policy was an ordinary full-paid policy, executed by the insurance company, as a company, to Mrs. Amick on November 7, 1883. It was an absolute contract of indemnity, whereby the company, in its entirety and as a single corporate entity, agreed

---

Separate Opinion.

---

to pay for all loss or damage to the insured property occasioned by fire up to the amount of \$2,000, within 60 days after notice and proof of loss; or to repair, rebuild or replace the property lost or damaged; and this agreement to pay or to repair, rebuild or replace was without any reference whatever to classes of business or members of the association or assessments. It was as absolute and unconditional a contract of indemnity as is ordinarily made by stock insurance companies. No premium note was given or executed by Mrs. Amick or by any one else in payment for the insurance, but the price of the insurance was wholly paid in cash; hence Mrs. Amick was not further liable to the insurance company, or to anyone else with reference to the insurance; or, in other words, she did not procure the insurance "upon the mutual plan" of premium notes, assessments, etc., but purchased the insurance absolutely from the insurance company, just as any person might purchase insurance from an ordinary stock insurance company not doing business "upon the mutual plan" at all. Sections 5 and 8 of chapter 111 of the Laws of 1875, which were then in force, read as follows:

"SEC. 5. The members of any company or association formed under this act shall be liable to such company, or to any other person, only to an additional amount equal to the principal and interest of the premium note given when effecting insurance."

"SEC. 8. All persons insuring upon the mutual plan, in any company organized in accordance with the provisions of this act, shall constitute its members and stockholders," etc.

There was nothing in the policy in the present case showing that Mrs. Amick became or was a member of the insurance company; and nothing anywhere else that would make her such unless the aforesaid statutes would; and nothing showing anything with reference to the class of business in which the policy was issued further than has already been stated in my former opinion, reported in 45 Kas. 742; 26 Pac. Rep. 946. But, with the opinion that I entertain, all this is immaterial, for the reason that the judgment rendered in the original case was a general judgment, authorizing a general execution

against all the property of the insurance company subject to execution; and such judgment has never been modified in any particular by any court or person having any authority to modify it. Judgments may be modified or vacated in the same court in which they were rendered, under § 568, *et seq.*, of the civil code; and they may also be modified or vacated by the supreme court under § 542, *et seq.*, of the civil code; and see also § 77 of the civil code. But the present judgment has never been vacated or modified in any manner recognized by any law; and really the only question now involved in the case is, whether a sheriff holding a general execution, issued in pursuance of a general judgment and following the judgment, may so modify the judgment or the execution that he may levy it *only* upon particular kinds of the property belonging to the judgment debtor subject to execution, and whether he is liable, in a different forum from the one from which the execution was issued, to be compelled to so modify the same if he should fail or refuse to do so. It is claimed that the execution should be levied upon only property belonging to the insurance company as property of its second-class business; but it is shown that the insurance company has no such property; that it had ceased to do a second-class business on January 25, 1884—long before any execution in this case was issued, long before the judgment in this case was rendered, and long before the time when the action in which such judgment was rendered was commenced. Such action was commenced on December 23, 1884; the judgment was rendered on October 17, 1885; and the question is now, whether such judgment may be enforced or not by the levy of an execution upon the general property of the insurance company subject to execution. Since January 25, 1884, the company has been doing only a single class of business, or, perhaps, rather a single business without reference to classes; and why should a sheriff, holding a general execution against all its property subject to execution, issued a great many years after January 25, 1884, and issued upon a general judgment rendered against the company on October 17, 1885, know that

---

Separate Opinion.

---

the execution should not have force or effect as a general execution, but only as a special execution against a particular class of property belonging to a particular class of business which the company had not for a great many years, nor for more than  $1\frac{1}{2}$  years before the judgment was rendered, carried on? How could the sheriff know that the company had ever carried on such a business, and modify the terms of the execution accordingly? Why should a sheriff be compelled to modify the terms of an execution, and then attempt to enforce it against a class of business which had not been in existence since January, 1884, more than a year and a half before the judgment was rendered, and more than seven years ago? "A judgment is the final determination of the rights of the parties in an action," (Civil Code, § 395,) and it imports absolute verity.

"No principle of law is more firmly settled than that the judgment of a court of competent jurisdiction, so long as it stands in full force and unreversed, cannot be impeached in any collateral proceeding on account of mere errors or irregularities, not going to the jurisdiction." (1 Black, Judgm., § 261.)

"A final judgment cannot be collaterally impeached because the opinion of the court shows that a different judgment should have been entered." (1 Black, Judgm., § 262.)

"It is a general rule that a valid judgment for the plaintiff definitely and finally negatives every defense that might and should have been raised against the action; and this is true not only with respect to further or supplementary proceedings in the same cause, but for the purposes of every subsequent suit between the same parties, whether founded upon the same or a different cause of action. A party cannot relitigate matters which he might have interposed, but failed to do so, in a prior action between the same parties or their privies in reference to the same subject-matter. And if one of the parties failed to introduce matters for the consideration of the court, that he might have done, he will be presumed to have waived his right to do so. If a party fails to plead a fact he might have pleaded, or makes a mistake in the progress of an action, or fails to prove a fact he might have proved, the law can afford him no relief. When a party passes by his opportunity, the law will not aid him." (2 Black, Judgm., § 754.)

"No defense can be set up against a judgment which might with proper diligence have been interposed in the action in which the judgment was rendered." (*Snow v. Mitchell*, 37 Kas. 636.)

See, also, *Boyd v. Huffaker*, 40 Kas. 634, 636, and authorities there cited.

"A party may have a good defense to an action, but if he fail to make such defense when the case is called for trial, he will not be permitted to come in weeks afterward and say that the judgment was wrong and ought to be set aside, simply because he had a good defense." (*Illiff v. Arnott*, 31 Kas. 674.)

See, also, *Larimer v. Knoyle*, 43 id. 351.

Now may a party, a corporation, which supposes it has a particular kind of defense in an action brought against it, fail to interpose the defense until the final judgment has been rendered in the case, and then, after several years have elapsed, and when an execution has been issued to enforce the judgment, appear before the sheriff and interpose its defense before him, and ask him to grant the defense, and, if he refuses, then go into a forum other than the one which rendered the judgment and issued the execution, and procure an order in that forum compelling the sheriff to recognize and sustain such defense? The original judgment was rendered in the district court of Franklin county, and the executions were issued from that court to the sheriff of Dickinson county, and it was the sheriff and the district court of the last-mentioned county that were asked to modify the executions or prevent their enforcement. Now, suppose the sheriff, when he was asked to modify these executions, or not to enforce them, for the reason that they should be enforced only against property belonging to the second-class business, of which there was none at that time, had answered: "I have examined that matter, and find that at the time when the original judgment was rendered, and even prior to the time when the action in which it was rendered was commenced, and more than seven years ago and ever since, your insurance company has been doing only one kind of business, and the judgment was rendered accordingly, and against the company in its entirety, and against all its property subject to

---

Separate Opinion.

---

execution:" then should the sheriff allow the company's defense and modify the judgment and the executions accordingly? One of the things which the insurance company wishes to protect in the present case is its guarantee fund of \$50,000, which was created in the early part of the year 1885, and before the judgment was rendered. The last execution issued on this judgment, and the one now sought to be modified or annulled, was issued on May 29, 1889; and on June 6, 1889, the superintendent of insurance reported concerning the aforesaid guarantee fund, as follows:

"The fund of the Abilene company consists of the stock of the Bonebrake Hardware Company, and the Abilene Water and Electric Light Company." (Supt. Ins. Rep. 1889, pp. 11, 12.)

It is not probable that any person would ever desire to attempt to levy an execution upon such a fund; and he could not do so until after all other resources had been exhausted. (Laws of 1885, ch. 130, § 2.) As to how actions may be brought and judgments rendered against mutual insurance companies doing business even upon the assessment plan, see 16 American and English Encyclopædia of Law, 88-90, and 2 May, Ins. (3d ed.), §§ 563*a* and 564. In the first authority cited, it is stated, among other things, as follows:

"When the insurance company refuses to make an assessment, it violates its contract, and becomes liable to the beneficiary for damages caused by such violation. Such damages, like all damages for breaches of contract, can be recovered by an action at law. The recovery should be for the maximum amount insured, unless the defendant shows, by pleadings and proof, that such sum should be reduced."

See also 2 May on Insurance, *supra*, to the same effect. It is further claimed by counsel for Mrs. Amick, that the insurance company has not only not done business in classes since January 25, 1884, but that the business which it has done it has done as one single business, including all kinds of fire insurance business; that since that time it has insured all kinds of insurable property. Under the statutes as they now exist, the insurance company would certainly have a right to do so.



---

 Guy v. Doak.
 

---

(Gen. Stat. of 1889, § 3418.) Therefore, in all probability, the insurance company has at the present time no property that belongs to any particular class of business, but simply has property, office furniture, and the like, belonging to itself as an entirety; and may not such property be levied upon, under a general execution against the company, issued upon a general judgment against the company? Or must Mrs. Amick and the sheriff still hunt for property belonging to the company's second-class business, which was extinguished more than seven years ago, and for property which no longer has any existence?

---

A. E. GUY, as *Receiver of J. H. Allen et al.*, v. D. P.  
DOAK *et al.*

1. **RECEIVER—Appointment, When Void.** A court or a judge at chambers has no power or jurisdiction to appoint a receiver when there is no action then pending.
2. ——— **Void Appointment.** Where a judge of the district court, by an order made at chambers, attempted to appoint a receiver on the 19th day of April, in an action that was not commenced until the 14th day of May of the same year, such appointment is absolutely void.

*Error from Kearny District Court.*

THE facts are sufficiently set forth in the opinion, filed June 6, 1891.

*Calhoun & Garwood, D. H. Ettien, and W. R. Hazen*, for plaintiff in error.

*Morgan, Lowrance & Mason*, for defendants in error.

Opinion by SIMPSON, C.: A. E. Guy, as receiver of J. H. Allen and A. P. Allen, filed his petition in the district court

---

Opinion of the Court.

---

of Kearny county on the 14th day of May, 1888, against D. P. Doak and A. T. Irvin, to recover the possession of 37 head of horses, 2 mules, 3 wagons, 400 tons of hay, and 218 head of cattle, alleged to be the property of the Allens. Guy claimed to have been appointed receiver in the action of Ott & Tewksbury, the Hamilton Land Company and M. F. Cooley v. D. P. Doak, A. T. Irvin, the Kendall Exchange Bank, and Thomas Doak, then pending in the district court of Kearny county, in which it was sought to foreclose certain chattel mortgages given to these parties by the Allens, and to determine the order of priority of liens between them and the defendants, and for other relief. The receiver was authorized by the court to bring this action. The pleadings were filed and issues made up, and the cause came on for trial at the October term, 1888. After the evidence had been submitted in behalf of the receiver, the defendants demurred to the evidence for the reason that such evidence failed to show facts sufficient to constitute a cause of action against said defendants. The court sustained the demurrer, and, after hearing the evidence on behalf of the defendants, found that the defendant D. P. Doak is, and at the time of the commencement of this action was, the owner and entitled to the immediate possession of the property described in the affidavit for replevin in this action, and of the property obtained by the plaintiff under the order of delivery issued in said action. The court found the value of the property at \$4,977, and that Doak had been damaged by its detention in the sum of \$737.33; that Doak was entitled to a return of the property, and, in case it could not be returned to him, rendered judgment for above amounts, with interest. A motion for a new trial was overruled, all proper exceptions saved, and the cause brought here for review.

A preliminary question is raised upon the condition of the record. It is said that, because there are two distinct cases made, we cannot consider the errors assigned. The case of Ott & Tewksbury *et al.* v. Doak *et al.* and this case were tried together, and both determined on the facts applicable to each case. A petition in error is filed in each case, the record be-

ing attached to one, and referred to in the other. While the better practice would be to file the transcript with each petition in error, in this particular case we think justice can be best subserved by disposing of both cases without reference to the technical defect in the record. It seems that the ruling of the trial court was produced by the fact that the receiver was attempted to be appointed in the case of *Ott & Tewksbury et al. v. Doak et al.* on the 19th day of April, 1888, when the action was not commenced, or the papers filed, until the 14th day of May, 1888, many days before the commencement of an action, a receiver was appointed or attempted to be appointed in that action. As a receiver is ancillary to the action, like an order of attachment, or an injunction, we know of no theory by which such an appointment can be sustained. No action was pending. No state of facts that could give the court power to make such an order had been presented. We regard the order appointing a receiver under such circumstances as an absolute nullity. It is a self-evident proposition, that the court or the judge at chambers cannot make an order in an action until one is pending in his court.

Attention is called to the fact that, on the 30th day of July, 1888, the defendants in error appeared before the judge at chambers, at Garden City, in Finney county, and moved the court to remove the receiver for causes recited in the motion, and that this motion was overruled, and counsel assert that this ratifies the original appointment. It is a proposition too plain for argument, that at the time the receiver commenced this action he must have been legally appointed in order to maintain it. This record shows that an order appointing a receiver was made by the district judge of the twenty-seventh judicial district, at chambers, in Garden City, Finney county, on the 19th day of April, 1888, in the case of *Ott & Tewksbury et al. v. Doak et al.*, and that this order was filed in the district court of Kearny county on the 14th day of May, 1888. The bond of the receiver so appointed was filed and approved by the clerk of the Kearny county district court on the 14th day of May, 1888. It further shows, that an order was made by

## Opinion of the Court.

the judge of the twenty-seventh judicial district, at chambers, in Scott City, Scott county, on the 9th day of May, 1888, authorizing the receiver to bring this action; this order being filed with the clerk of the district court of Kearny county on the 14th day of May, 1888, by instructions of the judge, made at chambers, in Kearny county, on the 9th day of May, 1888. The question presented seems at first glance to be difficult of solution, because it is very near the dividing line of two well-recognized principles. If it had not been for this motion, there is no doubt in the mind of the writer of this opinion but that these defendants in error could take advantage of the fact that no action was pending at the time of this appointment, and hence there was a total want of power or jurisdiction to make such appointment. But the defendants in error having made a motion to discharge the receiver for various reasons, (not including the non-pendency of the action,) and that motion having been determined against them, can they now be heard on the question of the want of power? At the time of the ruling on the motion to discharge the receiver, the court had undoubted power to appoint one. We find no case directly in point. *Baker v. Backus*, 32 Ill. 79, is one in which a receiver was appointed on an *ex parte* application at the filing of the bill to take possession of the property of a corporation which was not made a party to the action. Other creditors of the corporation who were made parties to the original bill, and who, by various acts pending the litigation, had recognized and dealt with the receiver both in and out of court, challenged the power of the court to appoint a receiver in the action, on the ground that there was no suit pending against the corporation. The supreme court of Illinois decided that the circuit court had no such power, and that the other creditors had such an interest in the franchise that they could assign this as error.

In the case of *Hardy v. McClellan*, 53 Miss. 507, the case came into the supreme court from a decree sustaining a demurrer to a petition by Josephine Hardy, the widow of Moses Hardy, to vacate an order made in the case of *McClellan v.*

---

Guy v. Doak.

---

*Moses Hardy's Heirs*, directing Bryan, as receiver, to pay over the money in his hands to McClellan. The widow contested the order, and in the course of the contest she petitioned the court to allow her to contest the legality of the appointment of the receiver. This the lower court would not do, and she appealed; and the supreme court say that the appointment was void, because no cause was pending at the time the receiver was appointed.

In the case of *Jones v. Schall*, 45 Mich. 379, a receiver was appointed on the 13th day of November; the bill to set aside certain alleged fraudulent chattel mortgages was filed on the 15th day of November of the same year. Possession was taken by the receiver, a sale made, and part of the money arising therefrom distributed by the final decree. The court say: "This appointment of a receiver, even if one could have been appointed at any stage of this case, was absolutely void, as the bill had not been filed and no suit commenced at the time." It seems in that case that some movement was made in the court below against the receiver, and the complaining parties appealed. And here they did not. So it seems, from a general consideration of these cases, that however much parties to the action may participate in the proceedings, and recognize for the time being an acting receiver, they still, at any stage of the action, may take advantage of the fact that the court had no power or jurisdiction to appoint a receiver at any time before the action was actually pending. Then, again, the adjudication on the motion to discharge the receiver would go no further than the allegations in the motion, and hence they were bound only to the extent that the receiver was an impartial person. It may be that, as the court at the time it heard the motion had the undoubted right and power to have then appointed a receiver, the acts of the receiver, after the adjudication on the motion, are valid and binding on all parties to the action, and especially as to these defendants in error. And this is probably the most favorable view that can be taken for the plaintiff in error, because it is clear that the action of the court on the motion could not reach back and validate an ap-

---

Opinion of the Court.

---

pointment that at the time it was made had no element of judicial power, or no jurisdictional ground to sustain it. We have been unable to find a single reported case anywhere that sustains a court in the appointment of a receiver before an action is pending, but, on the contrary, the text-books and reports are all against the existence of such a power. This seems to have been the controlling question on the demurrer to the evidence. The fair implication from the record, the proceedings subsequent to the demurrer, and the assertions and arguments of counsel on both sides, concur that the demurrer was sustained because it was necessary that Guy, having sued as receiver, must establish his authority and prove a legal appointment; and having failed to do this, the ruling was against him for that reason. If this was the controlling question, the ruling of the trial court was right.

We have to say, in reply to a suggestion of counsel for plaintiff in error, that we think that the demurrer reached the question of the illegal appointment. While we feel much reluctance, based on a general and equitable view of this case, in so doing, we are compelled by the mode of trial, the condition of the record, and the legal principles made applicable to the facts, as presented by this record, to recommend an affirmation of the judgment of the district court.

By the Court: It is so ordered.

All the Justices concurring.

## THE STATE OF KANSAS V. CHARLES ZIMMERMAN.

1. **FORGERY**—*Information*. It is proper to charge, in separate and distinct counts of the same information, the forgery of a promissory note, and the selling, exchanging or uttering of it as genuine.
2. **EVIDENCE**—*Comparison of Signatures*. Where, in a criminal case, a defendant is charged with the forgery of a note and mortgage, and the state and the defendant both prove upon the trial that a former mortgage offered in evidence was signed by the party whose signature is charged to have been forged, such former mortgage is competent evidence to be examined by the jury for the purpose of comparing the genuine signature upon the former mortgage with those disputed and denied, to assist in determining whether the latter were genuine.

*Appeal from Barber District Court.*

PROSECUTION for forgery. From a conviction at the May term, 1891, the defendant, *Zimmerman*, appeals.

*Martin & McNeal*, and *E. Sample*, for appellant.

*John N. Ives*, attorney general, and *Lyman W. DeGeer*, county attorney, for The State.

The opinion of the court was delivered by

HORTON, C. J.: Charles Zimmerman was charged, in an information filed by the county attorney of Barber county, in the first count thereof, with having, on the 7th day of December, 1889, forged the name of Mrs. Ella Lee to a promissory note of the sum of \$450. The second count charged Zimmerman with having sold, delivered and exchanged the note with intent to defraud Mrs. Ella Lee, knowing the same to be a forgery. The third count charged Zimmerman with having forged the name of Mrs. Ella Lee to a chattel mortgage, purporting to secure the note of \$450. Zimmerman was convicted upon the first and second counts, and sentenced to imprisonment and hard labor in the penitentiary of the state for the period of one year on the first count, and also one year on the second count; the second term of imprisonment

to commence upon the expiration of the first term. From the conviction and sentence of the trial court, an appeal is taken to this court.

I. It is contended that the trial court erred in overruling the motion to quash the information, and also in refusing to compel the state to elect upon which count it would rely for conviction. The first count of the information for forgery in the third degree was drawn under § 129 of the act relating to crimes and punishments. This offense is punishable under the statute by confinement and hard labor not exceeding seven years. The second count of the information for forgery in the fourth degree was drawn under § 133 of the act relating to crimes and punishments. This offense is punishable by confinement and hard labor not exceeding five years, or by imprisonment in the county jail not less than six months. In support of the contention that the information should have been quashed, or the state compelled to elect, it is said that the information contains counts for separate and distinct felonies, and that these felonies are not necessarily punishable under the statute in the same way. The authorities fully sustain the information. It was decided in *The State v. Hodges*, 45 Kas. 390, that "several separate and distinct felonies may be charged in separate counts of one and the same information, where all of the offenses charged are of the same general character, requiring the same mode of trial, the same kind of evidence, and the same kind of punishment." (See Whar. Crim. Pl. & Pr., § 285, *et seq.*, and cases there cited; 1 Bish. Crim. Proc., 3d ed., §§ 424, 450, 451; 4 Am. & Eng. Encyc. of Law, 754-756; *The State v. Bancroft*, 22 Kas. 170; *The State v. Chandler*, 31 id. 201; *The State v. Goodwin*, 33 id. 538; *The State v. Fisher*, 37 id. 404.) In this case, all of the counts are under different sections of the same statute, and relate to the same transaction. It matters not that the offenses alleged in the different counts are of different grades and call for different punishments. So long as all of the counts relate to the same transaction, there can be no objection to the union of such counts in the same information. It is proper to charge



in an information the forgery of a note or other written instrument and the selling or uttering of the same as genuine. (*The State v. McPherson*, 9 Iowa, 53; *The State v. Nichols*, 38 id. 110; *Hoskins v. The State*, 11 Ga. 92; *Barnwell v. The State*, 1 Tex. App. 745; Maxw. Crim. Proc. 52, 53.)

II. Upon the trial, Zimmerman claimed in his defense that the note of \$450, and the chattel mortgage given to secure the same, were signed by Mrs. Ella Lee, and therefore genuine. He also claimed that the note and mortgage were given in renewal of a promissory note dated the 12th day of June, 1889, of \$319, and secured by a chattel mortgage of the same date. This note and chattel mortgage he attempted to introduce in evidence before the jury for the purpose of allowing them to be compared with the signatures to the note and mortgage of \$450, which he was charged with having forged. The state introduced Mrs. Ella Lee, who testified that she never signed the note of \$450, or the mortgage given to secure the same. She further testified, that on the 7th of December, 1889, Charles Zimmerman called to see her about signing the note and mortgage of \$450; that he told her this note and mortgage were to renew the note and mortgage of the 12th of June, 1889. She then testified that she and her husband gave the mortgage of the 12th of June, 1889; that it was drawn up at her house, and that she signed the mortgage, but did not sign the promissory note which the mortgage was given to secure. During her examination Mrs. Lee repeated the statement that she signed the mortgage of June 12, 1889. Mr. Zimmerman testified that Mrs. Lee signed both the note and mortgage of June 12, 1889. As the signature of Mrs. Ella Lee upon the mortgage of June 12, 1889, was testified to as genuine, both upon the part of the state and upon the part of the defendant, it must be admitted to be genuine. The trial court, upon the testimony, ought to have allowed the prior mortgage to be introduced in evidence for the purpose of comparing Mrs. Ella Lee's signature on that instrument with the signature on the note and mortgage described in the information. The jury ought to have been allowed to ex-

## Hurd v. Simpson.

amine the admitted signature for the purpose of comparison. In *Macomber v. Scott*, 10 Kas. 335, it was said that—

“It will generally be conceded that comparisons may be had between writings in the following cases: Where the writings to be used as specimens are admitted to be genuine, and generally where no collateral issues can arise; where the different writings are already properly in evidence, or properly in the case for some other purpose; where the witness has seen the person whose signature is disputed previously write, although it has been only his name; where the witness has personal knowledge of the person’s writing from some other proper source, as from having seen writing which the person in the course of business has acknowledged to be his, or has acted on as his, etc.; where writings are of such antiquity that living witnesses cannot be had to prove them, and such writings are not so old as to prove themselves; and probably in many more cases which we might mention.”

On account of the rejection of competent and important evidence offered by the defendant, the judgment must be reversed, and the cause remanded for a new trial.

All the Justices concurring.

---

W. H. HURD v. MARY H. SIMPSON *et al.*

1. **DEFECT OF PARTIES—Waiver.** A defect of parties should be raised either by answer or demurrer, and, when not so taken advantage of, is usually waived.
2. **EVIDENCE—Findings.** The evidence examined, and found sufficient to support the special findings and judgment of the trial court.

*Error from Harper District Court.*

THE facts are sufficiently stated in the opinion.

*Geo. E. McMahon*, for plaintiff in error.

*Shepard, Grove & Shepard*, for defendants in error.

47	245
47	373
47	245
49	725

Opinion by GREEN, C.: This was an action brought by the defendants in error, who are husband and wife, to recover the balance of the purchase-price of certain real estate in the city of Anthony, in Harper county. The title to a portion of the real estate was in each one of the plaintiffs below. On the 11th day of March, 1887, S. E. Adams, John F. Goggin and B. F. Smith were engaged in the real-estate business in Anthony, under the name of the Anthony real-estate exchange. The real estate in question was placed in the hands of said firm, and sold on the same day, for \$5,650, and a deed was made by R. J. and Mary H. Simpson to W. H. Hurd, the plaintiff in error. The court below found that S. E. Adams, one of the members of the real-estate exchange, in behalf of the plaintiffs below, sold said real estate to W. H. Hurd, John F. Goggin and J. T. Holdridge; that there was a mortgage upon the premises for \$2,890, which the purchasers were to assume as a part of the consideration; that \$750 was the only part of the purchase-price paid to the plaintiffs below, or either of them; that two of the lots conveyed to the plaintiff in error were sold and deeded by him to the purchaser, the consideration expressed being \$800; that on the 16th day of May, 1887, W. H. Hurd paid interest upon the mortgage upon the land deeded to him, amounting to the sum of \$288. From the conclusions of fact, the trial court found that the plaintiffs were entitled to recover the sum of \$2,010, with interest at 7 per cent. per annum from the 11th day of March, 1887, for which judgment was rendered in the court below. The plaintiff in error assigns error, and brings the record to this court for review.

The first assignment is, that the court erred in overruling defendant's objection to the misjoinder of plaintiffs. This objection was not made by answer or demurrer, and hence cannot be considered. The answer was a general denial. The rule is well settled that a misjoinder or defect of parties is waived, if not taken advantage of by demurrer or answer. (*Comm'rs of Lyon Co. v. Coman*, 43 Kas. 676; *Coulson v.*

*Wing*, 42 id. 507; *Woodman v. Davis*, 32 id. 344; *Thomas v. Reynolds*, 29 id. 304.)

The next contention of the plaintiff in error is, that there was a failure of proof upon the part of the plaintiff below, and hence a demurrer to the evidence should have been sustained. We have carefully considered all the evidence in the record, and we think there is sufficient to uphold each and all of the special findings of fact. The plaintiff in error had knowledge of the fact that the land was deeded to him a short time after the execution of the same; he and his wife executed a warranty deed to a portion of the same property conveyed to him by this deed from the plaintiff below, and he also paid the interest upon the mortgage. There certainly was evidence of the recognition of the purchase of the land.

We find no error in the proceedings of the court below, and the judgment should, therefore, be affirmed.

By the Court: It is so ordered.

All the Justices concurring.

---

47	247
47	250

### H. D. BOOGE V. WALTER SCOTT *et al.*

**FINDINGS—Judgment, When not Reversed.** Where special findings are immaterial, a judgment will not be reversed, although there may be no evidence to support such findings.

#### *Error from Shawnee District Court.*

THE facts are stated in the opinion herein, filed November 7, 1891.

*H. H. Harris*, for plaintiff in error.

*C. M. Foster*, and *J. G. Slonecker*, for defendants in error.

Opinion by GREEN, C.: This was an action in the nature of ejectment, brought by the plaintiff in error to recover lot

109 and the north half of lot 111, on Taylor street, in the city of Topeka. The district court found for the defendants, and the plaintiff brings the case here. The material facts are: That the real estate sued for was a part of an Indian float, which was purchased by C. K. Holliday, president of a company known as the Topeka Association, and became a part of the Topeka town-site. The land was divided into shares, and Milton C. Dickey became the owner of the property in question. On the 16th day of February, 1858, he conveyed the lot and a half described in the plaintiff's petition, with other land, to Benj. J. Fisk, by a deed of special warranty, which was immediately recorded in the office of the register of deeds of Shawnee county. The Topeka Association authorized C. K. Holliday, as its trustee, to convey the legal title to the lots to the parties who had drawn them, or to their grantees. On the 10th day of July, 1858, Benj. J. Fisk reconveyed the lots he had received a deed for to Milton C. Dickey, but described the lots as being situated on Tyler instead of Taylor street. On September 24, 1859, Dickey conveyed the lots to Saunders R. Shepherd, who deeded the same to Joseph F. Cummings. On November 1, 1859, C. K. Holliday, as president and special trustee, conveyed the lots to Sarah Harlan Cummings, the wife of the grantee last named, and from her there is a regular chain of title to Walter Scott, one of the defendants in error. On the 24th day of September, 1887, Fisk conveyed the property to Milo J. Goss, by quitclaim deed, and on the 7th day of November following Goss conveyed the same to the plaintiff in error, who had no notice that Fisk had attempted to convey this same property to anyone else. This property was vacant until 1882, when it was occupied, and has been in the possession of the defendants ever since. The plaintiff had no actual notice that the deed from Dickey to Fisk was claimed to be a mortgage. The case was tried by the court, and, among others, the following special findings of fact were made:

"1. On February 9, 1858, Milton C. Dickey borrowed from Benj. J. Fisk \$100, and, as security therefor, Dickey

## Opinion of the Court.

made to Fisk a deed of conveyance for the land described in plaintiff's petition.

"2. On July 10, 1858, Dickey repaid Fisk the \$100, and on the same day Fisk made a deed of conveyance of certain lots, but by mistake of the conveyancer in preparing the deed, or the register in recording the same, the lots described in the deed as recorded were designated as being on Tyler street, when in fact Fisk intended to convey to Dickey lots numbered 109, 111, and 113, on Taylor street.

"3. Fisk never owned lots numbered 109, 111, and 113, on Tyler street, in the city of Topeka; and the Topeka Association, or C. K. Holliday as trustee, never executed to Dickey any writing whereby it or he agreed to convey to Dickey the lots described in the plaintiff's petition."

The case-made shows that the only evidence introduced to support the above findings of fact was the deposition of Benj. J. Fisk, and a deed from him to Dickey. Complaint is made that Fisk, who testified by deposition, was permitted to give evidence as to what a certain diary, which he had kept, showed concerning the transaction between him and Dickey; that without this evidence these findings are unsupported; and with them eliminated from the case the judgment should be for the plaintiff. We do not think that the findings complained of are material. The plaintiff must recover upon the strength of his own title, which he alleges was a legal one. The common source of title was from Holliday, as trustee, who held the legal title until he conveyed to Cummings, from whom the chain is complete to the defendants; and there is no deed from the Topeka Association to the plaintiff or any of his grantors. Before the plaintiff can recover in an action in the nature of ejectment, he must show that he has either an equitable or a legal title to the real estate. In this case the plaintiff relied upon a legal title, and we cannot say that the three special findings complained of are material; and therefore the judgment should not be reversed because there was no competent evidence to support it.

We recommend an affirmance of the judgment of the district court.

---

*In re Short, Petitioner.*


---

By the Court: It is so ordered.

All the Justices concurring.

*Per Curiam:* The facts in the case of *Booge v. Scott*, just decided, and the questions of law maintained therein, being substantially the same as in the case of *H. D. BOOGE v. LIZZIE P. HUNTOON et al.*, this case will be decided upon the authority of that case. Judgment affirmed.

---

*In the matter of the Petition of CORDELIA SHORT for a Writ of Habeas Corpus.—In the matter of the Petition of JAMES CROSS for a Writ of Habeas Corpus.*

1. **COUNTIES—Corporate Existence—Collateral Attack.** Where a public organization, of a corporate or quasi-corporate character, has an existence in fact, and is acting under color of law, and its existence is not questioned by the state, its existence cannot be collaterally drawn in question by private parties.
2. **Validity of County Organization.** Therefore, where a county has been organized under valid laws, and is acting as a county under valid laws, and a judgment is rendered in such county or by virtue of proceedings commenced in such county against an individual, providing for his imprisonment because of his having committed a public offense in such county, and under the judgment he is imprisoned, such individual cannot, in a proceeding in *habeas corpus*, attack the validity of the existence of such county upon the ground merely that "the plats, field-notes and records of the original government survey now on file in the office of the auditor of state in the state capitol" show that the county, as originally created by the legislature, and as afterward organized and as now existing, contains only 430½ square miles in area, while the constitution requires that no county shall be organized with a less area than 432 square miles. (Const., art. 9, § 1.)

*Original Proceedings in Habeas Corpus.*

THE case is sufficiently stated in the opinion, filed at the session of the court in November, 1891.

---

Opinion of the Court.

---

*Fred. C. Thomas* for petitioner.

*Milton Brown*, for respondent.

The opinion of the court was delivered by

VALENTINE, J.: Two proceedings in *habeas corpus* have been instituted in this court, in each of which the validity of the organization of Garfield county is attempted to be challenged. In the first proceeding, it appears that Mrs. Cordelia Short was regularly charged in the district court of that county upon a criminal information with committing the offense of manslaughter in the first degree. She obtained a change of venue from that court to the district court of Hodgeman county, where she was tried and convicted, and sentenced to confinement in the penitentiary for the term of five years; and it is now claimed that, because of the alleged invalidity of the organization of Garfield county, she is unlawfully restrained of her liberty by George H. Case, the warden of the state penitentiary. In the other case, the petitioner, James Cross, was charged before a justice of the peace of Center township, in Garfield county, with committing the offense of assault and battery, and was tried and convicted, and sentenced to pay a fine of \$2.50, and to stand committed to the county jail until such fine and the costs of suit should be paid; and he now claims that he is unlawfully restrained of his liberty by J. B. Newbold, a constable of said Center township.

It appears that the county of Garfield was created as a territorial entity by an act of the legislature which took effect on March 23, 1887. (Laws of 1887, ch. 81, § 6; Gen. Stat. of 1889, ¶ 1491.) It was to contain, and now contains, twelve congressional townships of land, to wit, townships number 21, 22 and 23 south, of ranges number 27, 28, 29 and 30 west. This creation of the county had nothing to do with its subsequent organization as a political entity, a municipal county, a corporation or *quasi* corporation. Afterward, and on April 16, 1887, the county was duly organized as a municipal county, a corporation, under the statutes of Kansas as they then ex-



---

*In re Short, Petitioner.*

---

isted. (Comp. Laws of 1885, §§ 1400-1412; Gen. Stat. of 1889, §§ 1577-1593.) It was divided into six municipal townships according to existing law, one of which was the above-named Center township. A full set of county and township officers was duly elected, and they qualified and served; a county-seat was duly established, and named "Eminence," and since that time the county has had a full and complete county organization as a county municipality; and it has in fact and at all times since acted as a duly- and legally-organized and existing county under the statutes of Kansas relating to counties and county officers; (Comp. Laws of 1885, chs. 25, 26, §§ 1429-1736; Gen. Stat. of 1889, chs. 25, 26, §§ 1611-1929;) and it has at all times since and by all persons been recognized as a duly- and legally-organized and existing county; and it is an organized and existing county *de facto*, if not such *de jure*. It will therefore be seen that the county was created territorially by a statute, and it was afterward organized as a municipality under the statutes, and has since acted and continues to act as such under the statutes; and no question has ever been raised or could fairly be raised as to the legality or validity of any one of these statutes except as to the first, the one by which the county, or rather its territorial boundaries, was originally created.

The petitioners, however, now raise the question of the validity of said first-mentioned statute in these proceedings. Or in other words, they claim that the act creating Garfield county territorially, or, in other words, defining its boundary lines, is unconstitutional and invalid, although no claim is made that the statutes under which the county was organized, and the statutes under which the county has been and is now acting as a county, are subject to any such infirmities, or that they are not amply sufficient and adequate to authorize counties to organize and to act under them as legal and valid county organizations. The parties, however, agree that the county of Garfield in area contains only "four hundred and thirty and one-half square miles, and no more, as shown by the plats, field-notes and records of the original government

## Opinion of the Court.

survey, now on file in the office of the auditor of state in the state capitol;" while the constitution requires that no county shall be organized with a less area than 432 square miles. (Const., art. 9, § 1.) It is therefore claimed by the petitioners, upon the facts as set forth in the aforesaid agreement, and upon no other facts or evidence, that the organization of Garfield county was and is absolutely void; that the county now has no legal or valid existence as a municipal entity; that therefore the aforesaid criminal prosecutions were and are absolutely void; that the judgments rendered therein, to wit, the judgment rendered by the district court of Hodgeman county against Cordelia Short, and the judgment rendered by the justice of the peace of Garfield county against James Cross, were and are absolutely void, and therefore that the imprisonment of these two persons is without authority of law, and illegal. We do not think, however, that the question of the validity or invalidity of the organization of Garfield county can be raised in these collateral proceedings or in any collateral manner. The question can be raised only by the state, in an action or proceeding in the nature of *quo warranto*. Where a public organization of a corporate or *quasi*-corporate character has an existence in fact and is acting under color of law, and its existence is not questioned by the state, its existence cannot be collaterally drawn in question by private parties. (Dill. Mun. Corp., 4th ed., § 43a; Cooley, Const. Lim., 6th ed., pp. 309, 310. See also the following cases: *Voss v. School District*, 18 Kas. 467; *School District v. The State*, 29 id. 57; *Back v. Carpenter*, 29 id. 349; *Ritchie v. Mulvane*, 39 id. 241, 255, 256, 257; *Mendenhall v. Burton*, 42 id. 570; *Tisdale v. Town of Minonk*, 46 Ill. 9; *Nettering v. City of Jacksonville*, 50 id. 39; *Town of Geneva v. Cole*, 61 id. 397; *City of St. Louis v. Shields*, 62 Mo. 247; *Inhabitants of Fredericktown v. Fox*, 84 id. 59; *The State v. Fuller*, 96 id. 165; *The People v. Maynard*, 15 Mich. 463, 470; *Stuart v. School District*, 30 id. 69; *Bird v. Perkins*, 33 id. 28; *Arapahoe Village v. Albee*, 24 Neb. 242; *Town of Henderson v. Davis*, 106 N. C. 88; *Speck v. The State*, 7 Baxt. [Tenn.] 46; *Ford v. Farmer*, 9 Humph.

---

*In re Short, Petitioner.*

---

[Tenn.] 152, 159, 160; *Sherry v. Gilmore*, 58 Wis. 324; *Austrian v. Guy*, 21 Fed. Rep. 500; *Hill v. City of Kahoka*, 35 id. 32. See also the cases of *Worley v. Harris*, 82 Ind. 493; *The State v. Leatherman*, 38 Ark. 81. And as to officers *de facto* see the following cases: *Ex parte Strang*, 21 Ohio St., 610; *Brown v. O'Connell*, 36 Conn. 432; *The State v. Carroll*, 38 id. 449; *Laver v. McGlachlin*, 28 Wis. 364; *Cole v. Black River Falls*, 57 id. 110; *Burt v. W. & St. P. Rld. Co.*, 31 Minn. 472.)

As before stated, the county of Garfield was organized under valid laws, it is now acting under valid laws, and the only question which we are now asked to consider is, whether the statute defining its boundaries is valid or not. It is claimed that the statute does not give to it territory enough by  $1\frac{1}{2}$  square miles, or 960 acres, to make it valid. We do not think that we can consider this question in these proceedings. But we might say, however, that the plats and field-notes of the original government survey are not conclusive evidence upon this subject. They are only *prima facie*. They may be rebutted or impeached as to their accuracy and correctness, and the fact that the legislature and the governor have created the county, and that it has been duly organized and is now acting as a county, is some evidence against their correctness, provided they show what the parties have agreed they show in this case. The question, however, as to whether the county has sufficient area or not cannot be litigated in either of these present *habeas corpus* proceedings.

The writ of *habeas corpus* prayed for will therefore be denied, and a judgment will be rendered in each case against the petitioner for costs.

All the Justices concurring.

SCHUSTER, HINGSTON & Co. v. FRED. H. KURTZ *et al.*47 255  
52 438

**CONVEYANCE—Fraud—Evidence.** In an action to set aside a conveyance on the ground of fraud, proof was offered tending to show that the conveyance was executed when the grantor, a merchant, was financially embarrassed and practically insolvent, to his clerk, who had no money with which to pay for the property, and who gave an unsecured promissory note for the entire consideration; also, that there was an agreement between them to say to any inquirers that the consideration was the promissory note and \$500 additional, which the grantor was owing the grantee, when, in fact, no such indebtedness existed. Testimony was also offered to show that the grantee had been in the employment of the grantor for about a year, and had opportunity to know the condition of his business, and that he purchased the land without examining its quality or the condition of the title thereto. A demurrer was interposed to the testimony of the plaintiff; and it is *held*, that the evidence, measured by the rule applicable when a demurrer is filed thereto, warranted the inference that the conveyance was voluntary, and made with the intent of both grantor and grantee to hinder and delay the creditors of the former, and that it was sufficient to resist the demurrer which was interposed.

*Error from Lane District Court.*

THE facts appear in the opinion. Judgment for the defendants, Kurtz and two others, at the October term, 1888. The plaintiffs, Schuster, Hingston & Co., bring the case here.

Lancaster, Hall & Pike, Geo. S. Redd, and T. J. Womack, for plaintiffs in error.

C. D. Pillsbury, and C. E. Lobdell, for defendants in error.

The opinion of the court was delivered by

JOHNSTON, J.: On December 24, 1887, Fred. H. Kurtz, a clothing merchant at Dighton, made an assignment. Prior to that time he had purchased large quantities of goods on credit, and the credits having expired, the creditors had for some time been pressing him for payment of their claims. He owed Schuster, Hingston & Co., one of the creditors, about \$4,000, and they instituted an attachment suit against Kurtz, and

---

Schuster v. Kurtz.

---

caused a levy to be made on a quarter-section of land in Lane county, as the property of Kurtz. This action resulted in a judgment in favor of Schuster, Hingston & Co., for about \$4,200. A few days prior to the assignment, Kurtz had executed a conveyance purporting to convey to Z. J. Anthoni the land mentioned, which was afterward attached at the instance of Schuster, Hingston & Co. Anthoni was a young man who had been employed as a clerk by Kurtz for about a year prior to that time at a small salary. Schuster, Hingston & Co. brought this action to set aside the deed as fraudulent and void, and to subject the land to the payment of their judgment against Kurtz.

After the plaintiffs had introduced their evidence, a demurrer to the same was interposed by the defendant and sustained by the court; and this ruling is assigned for error. Upon that demurrer, the question before the court was not what portion of the conflicting evidence introduced was the most credible, nor how the conflict should be determined, but it was rather, whether, taking as true every part of the evidence which tended to prove plaintiffs' claim, did it make out a *prima facie* case in their favor? All reasonable inferences and presumptions should have been resolved in favor of the plaintiffs, as the demurrer admitted every fact and conclusion which the evidence most favorable to the plaintiffs tended to prove. (*Bequillard v. Bartlett*, 19 Kas. 382; *Brown v. Railroad Co.*, 31 id. 1; *Wolf v. Washer*, 32 id. 533; *Christie v. Barnes*, 33 id. 317; *Rogers v. Hodgson*, 46 id. 276.) Looking at the testimony offered in that light, we are led to conclude that the demurrer should have been overruled.

Although there was no direct and positive proof of fraudulent motives on the part of Kurtz and Anthoni, there were many facts and circumstances indicating a want of good faith on the part of both. It appears that, a short time before the making of the conveyance in question, Kurtz bought large lots of goods from several creditors on short periods of credit. The claims had become due, and he was unable to pay them. Not only this, but it appears that at the time of the convey-

---

Opinion of the Court.

---

ance his liabilities exceeded his entire property and assets. Shortly before that time, he had marked down the prices on his goods, and Anthoni had assisted him in doing so. The conveyance was made when he knew he was insolvent, and to Anthoni, who was unable to, and did not, pay him any money. Anthoni gave his note, payable in 30 days, for \$1,000, which was alleged to be the agreed consideration, and it does not appear that he had any resources with which to make payment at that time or in the near future. Kurtz was being pressed by his creditors, and was arranging to make an assignment at the time he made the conveyance. The deed was acknowledged on December 20, 1887, and he asked Riley to act as assignee for him, either on the 20th or 21st of the same month. For about a year previous to that time Anthoni was employed by Kurtz at a monthly salary of from \$25 to \$46; and in the absence of Kurtz he had charge of the store, and must have had considerable knowledge of the condition of the business. When Kurtz proposed to sell the land, Anthoni replied: "I can't buy a setting hen." Notwithstanding this admission, he promised to pay \$1,000 within 30 days. After Kurtz had exchanged a deed for Anthoni's \$1,000 note, Kurtz told Anthoni to tell anyone who inquired that the consideration was \$1,500 instead of \$1,000; and further, that Kurtz had borrowed \$500 from Anthoni while he was in Kurtz's employment, and that Anthoni had given his note for the balance. No such indebtedness, in fact, existed, and Kurtz was only owing Anthoni at that time about \$13, which was due him upon his salary as clerk. As stated, Anthoni did not pay any cash, but gave his mere promise to pay; and it appears that at the time he did not have to exceed \$25 or \$30 in money, and the only property which he possessed was a little furniture and a small piece of real property which was heavily incumbered. He did not have the ability to meet the \$1,000 note, and it was not paid at the time of the trial. He purchased without an examination of the land, or any examination of the records with reference to the condition of the title. If every one of these facts and circumstances is taken in the light most favorable to

the plaintiffs, it is difficult to reconcile the conduct of Kurtz and Anthoni with honesty of purpose in the transaction. Why did Kurtz, when he was in a failing condition, and in great need of money to satisfy importunate creditors, transfer property to one not able to pay him any money, and who had no prospects that he would be able to pay at the maturity of the promissory note which was taken? Why did he exchange property upon which his creditors had a right to depend, and which would have aided in relieving his financial stress, for an unsecured promissory note? Why did he not even take any security upon the land which he transferred? And, again, why did he advise the grantee to make a false statement as to his being indebted to him in the sum of \$500, and as to the consideration paid for the land? These and other matters which have been referred to can possibly be explained and shown to be consistent with honest motives, but they are so indicative of a purpose to hinder, delay and defraud creditors as to require explanation. The circumstances surrounding the case are equally strong against the good faith and fairness of Anthoni. We think that, in the absence of explanatory proof, the court might reasonably infer that the conveyance was voluntary, and that the intent of both grantor and grantee was to hinder and delay the creditors of the former. Measured by the rule which must apply where a demurrer is interposed, the evidence must be held sufficient to resist the demurrer, and hence there must be a reversal of the judgment and a new trial of the cause.

All the Justices concurring.

## THE STATE OF KANSAS V. PAT. NULTY.

47 259  
d63 266

**INTOXICATING LIQUOR—*Illegal Sales—Information—Evidence.*** Where a county attorney files an information charging the defendant with illegal sales of intoxicating liquor, and positively verifies the same, but files therewith, and by special averment makes a part thereof, a sworn statement of a private person who testified to illegal sales made to him by the defendant, and such person is not used as a witness at the trial, but the county attorney elects to rely on another sale made to a different person, and it sufficiently appears that at the time of the filing of the information neither the county attorney nor the person who made the sworn statement had notice or knowledge of the particular offense relied upon for conviction, the defendant should not be found guilty of such particular offense. The case of *The State v. Brooks*, 33 Kas. 708, cited, and followed.

*Appeal from Chautauqua District Court.*

**PROSECUTION** for illegal sale of intoxicating liquor. From a conviction, at the November term, 1890, the defendant, *Nulty*, appeals. The opinion states the facts.

*Campbell & Dyer*, for appellant.

*B. S. McGuire*, county attorney, and *J. D. McBrien*, for The State.

Opinion by **SIMPSON, C.**: The appellant was convicted in the Chatauqua county district court of an illegal sale of intoxicating liquor. The information filed against him contained four counts. He was acquitted on the first, third and fourth counts, and convicted on the second. The following language constituted a part of the information:

“And said county attorney hereby refers to the testimony of Jeremiah Ellixson, hereto attached, marked ‘B,’ and makes the same part of this information and each and every count thereof.”

The testimony of Ellixson referred to in the information was given under oath on the 19th day of April, 1890, in an inquiry made by the county attorney at his office. The state-



---

The State v. Nulty.

---

ment recited that Ellixson "got some beer last fall, during the day of the republican primary in Sedan, from Philip Smith and Pat. Nulty. I paid Philip Smith once for it, and I think I got some once in which Pat. Nulty made the change." At the close of the evidence the county attorney elected to rely on a sale made to one A. C. Hilligoss for a conviction on the second count. Hilligoss testified that he thought that some time during the year 1889 he bought more than once whisky by the drink from the appellant, and paid him 10 cents per drink for it. He also testified that he could not mention anyone else whom he saw buy intoxicating liquors from Pat. Nulty in the year 1889. The information was filed on the 22d of August, 1890. The county attorney filed a written motion to be allowed to indorse the names of A. C. Hilligoss and others on the information on the 10th day of November, 1890. This motion is supported by an affidavit of the county attorney, in which he states that the testimony of said witnesses did not come to his knowledge in time to make this application at an earlier date. Ellixson was not a witness at the trial of the cause.

Upon this state of facts, we are compelled to reverse the judgment of conviction, and grant the appellant a new trial. It has been decided time and time again by this court that when the information is verified by the oath of a private person, and not by the county attorney, the defendant should not be found guilty of any offense except one of which the complaining witness had notice or knowledge at the time of verifying the information. (*The State v. Brooks*, 33 Kas. 708; *The State v. Skinner*, 34 id. 265; *The State v. Hescher*, 46 id. 534.) It is true that this information is sworn to positively by the county attorney; but he filed with it, and makes a part of it by special and express averment, the sworn statement of Ellixson, and by this means presents to the defendant the particular offense with which he is charged. If he had not done this, but had relied on his own positive verification of the information, the judgment of conviction on the second count would not have been open to the objection made. But

---

Opinion of the Court.

---

his positive verification is based upon and justified by the sworn statement of Ellixson, incorporated into and made a material part of the information, and hence the information charges the particular offense of selling to Ellixson as detailed in the sworn statement. It is shown conclusively by the record that at the time the information was filed neither Ellixson nor the county attorney had any notice or knowledge of the sale to Hilligoss. Ellixson does not make any statement of such a sale in his examination. The county attorney, in November, makes a motion to have the name of Hilligoss indorsed on the information, for the reason that the knowledge that Hilligoss would swear to an illegal sale had just come to his knowledge. So that it appears that, at the time the information was filed, notice or knowledge of the sale to Hilligoss was not had or possessed either by Ellixson or the county attorney. Apart from the reasons given by Mr. Justice VALENTINE in the Brooks case, if we permit this practice we would encourage county attorneys to file a bill of particulars against a defendant, and at the trial prove an entirely different offense; one of which the defendant had no notice or no time to prepare a defense.

The other reasons urged for a reversal need not be considered. The judgment must be reversed, and a new trial granted. The county attorney can obviate this objection by filing another information, if the offense is not barred by the statute of limitation.

By the Court: It is so ordered.

All the Justices concurring.

47 262  
54 5*In the matter of the Petition of BRUCE HARMER for a Writ of Habeas Corpus.*

1. **INTOXICATING LIQUORS—Abatement of Nuisance.** The judge of the district court has no authority to make an order at chambers abating a place as a nuisance where intoxicating liquors are alleged to have been sold in violation of law, and forever enjoining the owner, lessee or keeper from maintaining such place.
2. **CONSTRUCTIVE CONTEMPT—Error.** It is error for a court or judge in any case to proceed against a person for a constructive contempt, without an affidavit or information in writing, containing a statement of facts constituting the contempt charged, being first filed in court or submitted to the judge.

*Original Proceeding in Habeas Corpus.*

THE opinion, filed November 7, 1891, states the facts.

*F. H. Foster*, for petitioner.

*T. J. Beebe*, county attorney, for respondent.

Opinion by GREEN, C.: The petitioner, Bruce Harmer, alleges that he is restrained of his liberty and unlawfully imprisoned by the sheriff of Harper county, under an order of commitment for contempt of court for violating an injunction order issued by the judge of the district court of said county. It appears from the petition for the writ that the county attorney filed an information in the district court of Harper county against J. H. Seifert and others, charging them with keeping and maintaining a common nuisance in Harper City; that no warrant was issued for the arrest of the petitioner. On the 10th day of June, 1891, the information so filed was presented to the district judge of the county, who, without further evidence, made the following order:

“In the district court of Harper county, Kansas.—The State of Kansas, plaintiff, v. J. H. Seifert, Bruce Harmer, *et al.*, defendants.—Order.—And now, on this 10th day of June, 1891, this cause coming on for hearing upon the application of T. J. Beebe, county attorney of said county, and it appear-

---

Opinion of the Court.

---

ing from the evidence that a common nuisance is being and has been maintained on the following-described premises, to wit, the rooms of the old Rothwell real-estate building, situated upon the south half of lot 12, block 21, Harper City, Harper county, Kansas, by the unlawful keeping and selling and keeping for sale intoxicating liquors in and upon said described premises contrary to law, it is therefore ordered and adjudged by the court, that the sheriff of Harper county abate said nuisance kept and maintained upon said premises, and that the owner, lessee and keeper of said above-described building and place be forever enjoined from keeping and maintaining said nuisance in and upon said above-described premises."

On the 29th day of August, 1891, the petitioner was brought before the district judge and informed that he was charged with violating the above order, when the further hearing of the proceeding was postponed until the 31st of August, at which time he appeared, when certain affidavits were read showing that beer had been sold by the petitioner, on the premises described in this order. Evidence was given by the sheriff that he had never served any order on the petitioner, or otherwise notified him of the order made by the judge. Upon this showing, the judge found the petitioner guilty of contempt of court for violating the above order, and ordered him committed to the jail of Harper county for 30 days and to pay a fine of \$100.

The order of the district judge declaring certain premises to be a common nuisance, and that the same should be abated by the sheriff, was void. The statute nowhere gives the district judge authority to make such an order. Section 2533 of the General Statutes of 1889 declares all places where intoxicating liquors are sold in violation of law to be common nuisances; and upon the judgment of a court having jurisdiction finding such places to be a nuisance, the sheriff or other officers named shall be directed to shut up and abate such places. The petitioner had no notice served upon him of any order made by the district judge, and could not therefore have been guilty of any contempt.

Another reason might be assigned why the proceedings

---

*In re Bush, Petitioner.*

---

against the petitioner for contempt were void. The alleged violation of the order was not in the presence of the judge or the court, and therefore, if such order had been authorized, it could only be characterized as constructive contempt, and the judge or court would have no authority to proceed against him without an affidavit or information, containing a statement of the facts constituting the alleged contempt, being first submitted to him or filed in court. (*The State v. Henthorn*, 46 Kas. 613; same case, 26 Pac. Rep. 937.)

The petitioner should be discharged.

By the Court: It is so ordered.

All the Justices concurring.

---

*In the matter of the Petition of BESSIE MAY BUSH, an  
Infant, for a Writ of Habeas Corpus.*

1. *INFANT—Adoption—Res Judicata.* An order of the probate court permitting the adoption of an infant child is conclusive so far as that court is concerned. Such court has no further jurisdiction in the matter.
2. ——— *Evidence—Custody of Child.* The evidence in this case examined, and held not to justify this court in depriving the respondents of the custody of the child sought to be taken from them.

*Original Proceeding in Habeas Corpus.*

THE facts are sufficiently stated in the opinion herein, filed November 7, 1891.

*M. E. Matthews*, for petitioner.

*J. F. Gurnsey*, and *W. C. Webb*, for respondents.

Opinion by STRANG, C.: September 19, 1887, there was born to Ida May Potter, a single woman of 17 years of age, a female child, afterward named Bessie May Potter.

---

Opinion of the Court.

---

The said Ida May Potter, being unable to properly support and care for her said child, and being anxious to procure a home for her, went, on the 28th day of August, 1888, before the probate judge of the county of Stafford, where she resided, and relinquished all her claim to said child to Calvin and Anna McClure, husband and wife, who at the same time appeared before said probate court and expressed a desire to adopt said child as their own. The probate court, after investigating the fitness of said persons, Calvin and Anna McClure, to take the care and custody of said infant, and to assume the relation of parents thereto, made an order permitting and confirming the adoption of said infant by said Calvin and Anna McClure, which said order shows that the court, and all the parties to the adoption of Bessie May Potter by Anna and Calvin McClure, complied with all the provisions of the statute relating to the adoption of minor children; after which the infant was taken by the McClures to their home, and from that time until the present has been cared for and supported as their own. On the 17th day of June, 1891, said Calvin and Anna McClure were cited to appear before the probate court of Stafford county, before which a hearing was then had, and a decision rendered by said court setting aside the order under which Bessie May Potter was adopted by Calvin and Anna McClure, because the mother of said child, Ida May Potter, who in the meantime had intermarried with a man named Bush, was not 18 years of age when she appeared before the probate court on the 28th day of August, 1888, and assented to the adoption of said infant by the McClures. The probate court also found that the mother of said child should pay the McClures some \$300 in money for the care and support of said child, and made such finding a part of its judgment, and required said sum to be paid before its judgment should take effect. The petitioner, not wishing to pay the \$300, and the respondents not wishing to accept the \$300 and surrender the child, then abandoned the probate court as a forum through which to obtain possession of her child, and filed her petition for a writ of *habeas corpus* in this

---

*In re Bush, Petitioner.*

---

court, July 22, 1891. Thereupon an order issued, requiring the respondents to produce the body of said infant before the court September 3, 1891. The respondents answered the petition, setting up the record of the probate court of Stafford county, showing the adoption of said infant by them, and alleging that they had and retained the custody of said child as their own by virtue of the proceedings and order of adoption of said probate court. A reply was filed by the petitioner, setting up the proceedings had in the probate court June 17, 1891.

This court is of the opinion that the proceedings before the probate court of Stafford county, on June 17, 1891, as set up in the reply of the petitioner, were wholly without jurisdiction, and therefore entitled to no weight in the consideration of this case; that the case is to be considered as having the same *status* here, now, as it would have if such proceedings had not been had, and the petitioner was here for her writ, alleging the matters contained in her petition. That being true, the only question for our consideration is, does the evidence establish the fact that the respondents are not proper persons to have the custody, care and education of said infant? If it does, it is our duty to take such infant from the possession of the respondents and place it in proper hands, looking principally to the future welfare of the infant in so doing. The record shows that the infant was less than one year old when the respondents adopted it, and that it is now four years of age. Doubtless, having taken the child when it was so young, and having kept it so long, and adopted it as their own, the McClures have become greatly attached to the child; and, indeed, their evidence shows that they entertain the same affection for it that they would had the child been born their own. Under such circumstances it would take a strong showing to induce this court to take the child from them for any purpose. While this court would not hesitate to remove the child from their custody if we were satisfied the respondents were not proper persons to bring it up, yet it would require a stronger showing than under many circumstances and con-

---

Opinion of the Court.

---

ditions to induce us to take the child from persons who adopted it as their own, by permission of the court, at such a tender age, when it required so much attention and care, and after they have cared for it for a period of three years and over. In this case, however, an examination of the evidence shows no occasion for the intervention of this court in behalf of said infant. The evidence shows the respondents cherish it as their own; that they are possessed of a home of their own, wherein they live about like the average of farming people in this new country; that they are members, in good standing, of a Christian church, and, so far as we are able to gather from the evidence, are themselves, as individuals, among the average of the people in the community where they reside. We believe these people who have this child are giving it, and will continue to give it, reasonably good care, and a reasonably good home. If at any time in the future, during the infancy of Bessie May, the respondents should fail in their duty to her to such an extent as to render it necessary and proper for this court to interfere in her behalf, we would, upon our attention being called thereto, promptly relieve them of the custody of the child and place it in other hands.

It is recommended that the writ be denied.

By the Court: It is so ordered.

All the Justices concurring.



47	268
51	206
47	268
67	845

# THE MISSOURI PACIFIC RAILWAY COMPANY V. WILLIAM H. LEA.

1. *CASE, Followed.* *Mo. Pac. Rly. Co. v. Merrill*, 40 Kas. 404, followed.
2. *JUDGMENT—Amendment in Supreme Court.* Where a trial court renders a judgment for a less amount than the verdict returned by the jury, such judgment cannot be corrected in the supreme court to conform to the verdict of the jury, in proceedings in error brought by the party against whom the judgment is rendered, when no cross-petition is filed by the party in whose favor the verdict is returned, asking for a correction or modification of the judgment.
3. *APPEAL from a Justice—New Petition—Practice.* Where an action is appealed from a justice of the peace to the district court, and the plaintiff, with the consent of the defendant, files in the district court a new petition, setting up a claim exceeding \$800, and the defendant voluntarily appears and files his answer thereto, the district court has jurisdiction to hear and determine the action upon the pleadings filed in that court, the same as if there had been no appeal.

## *Error from Marshall District Court.*

THE opinion states the facts. Judgment for plaintiff, *Lea*, at the December term, 1888. The defendant *Company* brings the case to this court.

*John V. Coon*, and *Waggener, Martin & Orr*, for plaintiff in error.

*W. H. H. Freeman*, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: William H. Lea filed his bill of particulars against the Missouri Pacific Railway Company before a justice of the peace of Marshall county, asking judgment for \$300 for the burning of a hay stack and 10 tons of hay, all valued at \$360. He recovered judgment against the railway company, and the case was taken to the district court by appeal. In that court, Lea filed his petition claiming judgment for \$360, with interest, and a reasonable attorney's fee. The railway company filed an answer containing a general denial, and

## Opinion of the Court.

alleging contributory negligence upon the part of Lea. The jury returned a verdict for \$207.98 for Lea, but the trial court deducted \$21.98 of interest, which was included in the general verdict, and rendered judgment in favor of Lea for \$186, and also for \$60 attorney's fee. It appears from the record that the evidence as to the amount of the attorney's fee was taken from the jury and passed upon by the court. To this ruling the railway company excepted. The exception ought to have been sustained. "What is a reasonable attorney's fee is a question of fact which should be submitted and determined the same as any other fact arising in the case." (*Mo. Pac. Rly. Co. v. Merrill*, 40 Kas. 404.) The attorney for Lea expressly stated at the oral argument that if the attorney's fee of \$60 and the interest of \$21.98, deducted by the trial court from the general verdict of the jury, could not be allowed, he desired a new trial for his client. The interest, amounting to \$21.98, if recoverable by Lea, cannot be added to the judgment by this court, because Lea has filed no cross-petition to correct or modify the judgment of the trial court. Upon the record and the statement of the attorney for Lea, a new trial must be awarded.

In view of a new hearing, it is necessary to dispose of another question presented. The railway company claims that its motion to dismiss the action for want of jurisdiction, and its objection to the introduction of any evidence for the same reason, should have been sustained. The following cases are cited: *Stanley v. Farmers' Bank*, 17 Kas. 592; *Wagstaff v. Challiss*, 31 id. 212; *Berroth v. McElvain*, 41 id. 269. We think the motion and objection came too late. The petition was filed in the district court with the written consent of the attorney of the railway company indorsed thereon. After the petition was filed, the railway company made a voluntary appearance in the court, and filed an answer containing a general denial and also alleging contributory negligence. The motion to dismiss was not made until several months after the answer was filed, and the objection to the evidence was not presented until the trial was commenced. Again, after the amended

petition was filed, the railway company entered its appearance by filing a motion to make the petition more definite and certain. Under the statute, the district court had jurisdiction of the cause of action even if there had never been any bill of particulars filed before the justice. The voluntary and general appearance of the railway company in the district court gave it jurisdiction over the defendant. (*Hefferlin v. Stucklager*, 6 Kas. 166; *Cohen v. Trowbridge*, 6 id. 393; *Carrer v. Shelly*, 17 id. 474; *Haas v. Lees*, 18 id. 454; *Shuster v. Finan*, 19 id. 116; *Dickson v. Randal*, 19 id. 212.)

"Any voluntary appearance of a party to an action which recognizes the general jurisdiction of the court, or which is not made for the special purpose of contesting the jurisdiction of the court, or for any other special purpose, will be construed to be a general appearance in the case, and will be held to give the court general jurisdiction in the case of such party." (*Cohen v. Trowbridge*, 6 Kas. 385, 393; *McBride v. Hartwell*, 2 id. 411, 415; 1 U. S. Dig., 1st series, 101, 103, ¶ 580, *et seq.*)

If the railway company had not consented to the filing of the new petition in the district court and voluntarily filed its answer to the first petition and subsequently its motion to make the amended petition more definite and certain, then its motion to dismiss ought to have been sustained, under the authority of *Wagstaff v. Challiss*, 31 Kas. 212; *Berroth v. McElvain*, 41 id. 269.

The judgment of the district court will be reversed, and the cause remanded for a new trial.

All the Justices concurring.

JOHN H. LAWSON V. THE BOARD OF COMMISSIONERS OF  
RENO COUNTY *et al.*

COUNTY AUDITOR, *When.* After chapter 87 of the Laws of 1891 was passed and took effect, there could be no such officer as county auditor in any county with less than 45,000 inhabitants, except in Leavenworth county.

*Original Proceeding in Mandamus.*

THIS case is sufficiently stated in the opinion, filed at the session of the court in November, 1891.

*Swigart, Martin & Crawford, and Whiteside & Gleason, for plaintiff.*

*C. M. Williams, for defendants.*

The opinion of the court was delivered by

VALENTINE, J.: This was an action of *mandamus* brought originally in this court on June 11, 1891, by John H. Lawson against G. M. Zimmerman, W. P. D. Flemming, and William Potter, the board of county commissioners, and S. J. Morris, the county clerk, and J. M. Anderson, the county treasurer, of Reno county, to compel the defendants to recognize the plaintiff as the county auditor of Reno county. The General Statutes of 1889 contain an article, No. 13, divided into paragraphs or sections numbered from 1840 to 1859, under which the plaintiff claims that he is and has been since April 30, 1890, the duly-appointed and qualified county auditor of Reno county. In March, 1891, the following act of the legislature, being chapter 87 of the Laws of 1891, was passed, approved, and published, as follows:

"SECTION 1. That section 1840 of the General Statutes of Kansas of 1889 be amended so as to read as follows: Section 1840. That in all counties containing over 45,000 inhabitants there shall be appointed by the district court of the judicial district in which such county is located, one person, who shall have the qualifications of an elector, and who shall be styled

county auditor, and who shall hold his office for the period of two years, unless sooner removed by the appointing power, for cause, according to existing laws, and if so removed, the cause thereof shall be made part of the record of the board of county commissioners: *Provided*, That for the purposes of this act, Leavenworth county shall be deemed to have over 45,000 inhabitants, and the office of county auditor is retained in that county.

"SEC. 2. Section 1840 of the General Statutes of 1889 be and the same is hereby repealed.

"SEC. 3. This act shall take effect and be in force from and after its publication in the official state paper.

"Approved March 10, 1891.

"Published in the official state paper March 20, 1891."

The original section (1840) was the same as the new section (1840) except as follows: In the original section the words "twenty-five" occurred where the words "forty-five" occur in the new section; the word "embraced" occurred in the old section where the word "located" occurs in the new, and the original section did not contain the proviso appended to the new. It is admitted that Reno county contains 25,000 inhabitants, but that it does not contain 45,000 inhabitants. It is claimed by the defendants that, admitting for the purposes of this case that the plaintiff would be county auditor of Reno county except for said chapter 87 of the Laws of 1891, still that in that case said chapter 87 abolished the office of county auditor in Reno county, and in all other counties of less than 45,000 inhabitants, except in Leavenworth county, and that as the office itself is abolished no one could fill the same; while the plaintiff claims that, under the general saving clause contained in §6687 of the General Statutes of 1889, he will retain the office for two years from the time when he first took the same, or up to April 30, 1892. Said saving clause reads as follows:

"The repeal of a statute does not revive a statute previously repealed, nor does such repeal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the statute repealed. The provisions of any statute, so far as they are the same as those

## Opinion of the Court.

of any prior statute, shall be construed as a continuation of such provisions, and not as a new enactment."

The most of the decisions of this court construing this saving clause will be found cited in the case of *In re Tillery*, 43 Kas. 188, 191. We do not think that this saving clause has the effect to continue the plaintiff in office. He has no vested right in the office or in anything pertaining thereto; (*Harvey v. Comm'rs of Rush Co.*, 33 Kas. 159; *In re Hinkle*, 31 id. 712;) and the statute passed in 1891 clearly shows that the legislature intended to abolish the office at once. It provided that the act of 1891 (and this means the whole of the act) should take effect and be in force from and after its publication in the official state paper, and provided that §1840 of the General Statutes of 1889, the section under which the plaintiff claims his office, should be repealed; and the repeal seems to be absolute and to take effect at once; and by the *proviso* the legislature declared that in Leavenworth county the office of county auditor should be "retained," indicating by the strongest of implications that it was the intention of the legislature that in every other county with less than 45,000 inhabitants the office of county auditor should be immediately abolished. This seems to be clear beyond all question.

The writ of *mandamus* prayed for in the present case will be denied, and judgment will be rendered in favor of the defendants and against the plaintiff for costs.

All the Justices concurring.

THE WICHITA & COLORADO RAILWAY COMPANY V.  
W. E. GIBBS.

1. **RAILROAD STOCK LAW—Action, Where Brought.** In an action brought under the railroad stock law of 1874, it is essential to allege that the stock was killed or injured in the county in which the action was brought. But where the plaintiff alleges that the defendant company owned and operated the road over and across the plaintiff's premises in Reno county, and that the defendant killed the plaintiff's cow "on the said railway track of said defendant and by the operation of said railway," and no other railroad or railway track is mentioned in the pleadings except the one through the plaintiff's farm, the pleadings sufficiently show that the accident occurred in Reno county, where the action was brought.
2. **Cow KILLED—Action Maintained.** Where a railroad company owns and operates a railroad, the construction of which is not entirely finished, and while so operating the road permits the contractor who constructed the road to run his construction train over the road so owned and operated by the company, and which at the time is unfenced, and a cow is killed by the construction train in consequence of the omission to enclose the road with a fence where it could have been fenced, an action may be maintained against the railroad company to enforce the statutory liability for the loss of the cow. (*Railroad Co. v. Ewing*, 23 Kas. 278; *Railway Co. v. Wood*, 24 id. 619.)
3. ——— The rejection of testimony which only tended to establish questions not in dispute is not error.
4. ——— *Excessive Verdict.* The verdict in the case found to be excessive, and the judgment is directed to be modified in accordance with the undisputed testimony as to the amount of damages sustained.

*Error from Reno District Court.*

THE opinion states the facts. Judgment for plaintiff, *Gibbs*, at the July term, 1888. The defendant *Company* brings the case here.

*J. H. Richards*, and *C. E. Benton*, for plaintiff in error;  
*Davidson & Williams*, of counsel.

*R. A. Campbell*, and *W. E. Vincent*, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J.: This action was brought by W. E. Gibbs against the Wichita & Colorado Railway Company to recover, as damages, the value of the plaintiff's cow and calf, alleged to have been killed by the negligence of the railway company in the operation of its railroad, at a point where it was not fenced. The jury returned a verdict in favor of Gibbs for \$64.59, and judgment was rendered thereon. The railway company alleges numerous errors. The first complaint is, that the amended bill of particulars, upon which the case was tried, failed to state facts sufficient to constitute a cause of action, and therefore the court erred in overruling the demurrer thereto. As the action was brought under the railroad stock law of 1874, it was essential to allege that the stock was killed or injured in the county in which the suit was commenced; and it is contended that there is an entire omission of any allegation in regard to the county in which the animal in controversy was alleged to have been killed. Although the allegations are not as explicit in this respect as they should have been, we think they sufficiently show that the accident occurred in Reno county, where the action was brought. It is alleged that the defendant company owned and operated a road over and across the plaintiff's farm, describing it, in Reno county, Kansas, and that the defendant killed plaintiff's cow "on the said railway track of said defendant, and by the operation of said railway." No other railroad or railway track is mentioned in the pleadings except the one through the plaintiff's farm, which is alleged to be in Reno county.

It was found by the jury that the cow was killed by a train operated upon the line of the Wichita & Colorado railway, but that it was killed by a construction train operated and controlled by Guy Phillips. He contracted to build the railway for the company for a stipulated consideration, and at the time the cow was killed the road was incomplete. The company complains because the court refused to receive in testimony the contract between the company and Phillips, which was offered for the purpose of showing that the killing oc-



curred when the road was in the course of construction and was still under the control of the contractor. The contract, however, contained nothing showing who was in control of the road at the time complained of, nothing which would shed any light upon the questions in dispute, and hence the testimony offered was immaterial. There was no question but that Phillips was the contractor engaged in building the road between Wichita and Hutchinson, nor any question that the construction of the road was not entirely finished. There is evidence, however, that the road was so far completed through the land of the defendant in error that it could be used by the company, and that the railway company was in possession of the road when the accident is claimed to have occurred. It was operating regular trains through his farm, and carrying both passengers and freight.

It is claimed by the company that, because the cow was killed by the construction train, which was operated and controlled by the contractor, it cannot be held liable for damages. The record shows that the company was the owner of the road, and was engaged in its operation. The fact that the road was incomplete, or that the company permitted Phillips to run a construction train over it, will not absolve it from liability. It was not inclosed with a lawful fence, and the statute casts a liability upon the company for cattle killed or injured by the engine or cars on such railway, "and that this does not require that such engine and cars be owned and operated by the company, was decided in the case of *K. C. F. S. & G. Rld. Co. v. Ewing*, 23 Kas. 273." (*K. P. Rly. Co. v. Wood*, 24 id. 619. See, also, *Railway Co. v. Curl*, 28 id. 622.) Under the cases cited, the contention of the plaintiff in error cannot be sustained, and there was no error in refusing the instruction which was requested, or in denying the motion of plaintiff in error for judgment upon the findings of the jury.

The objections made against the admission of testimony are not good. The company contends that the verdict is not sustained by sufficient evidence. The testimony, though very weak, tends to sustain the claim of the defendant in error that

*In re. Hyde, Petitioner.*

the cow was killed in the operation of the railroad; but we are unable to find testimony which justified the jury in awarding damages in the sum of \$64.59. The evidence of the plaintiff and his witnesses placed the value of the cow at \$35, and the question of damages for the loss of the calf was excluded from the consideration of the jury. The only evidence as to any attorney's fee fixed the sum of \$20 as a proper and reasonable charge. Gibbs, then, is entitled to \$35, the value of the cow, with interest at 7 per cent. on that sum from September 4, 1886, when the cow was killed, until July 18, 1888, when the verdict was returned, which was \$4.59, making the amount \$39.59; and this amount, with the \$20 attorney's fee, is all that should have been included in the verdict. The judgment must, therefore, be modified, and the case is remanded, with the direction to the district court to enter judgment in favor of Gibbs for \$59.59.

The costs in this court will be divided between the parties.  
All the Justices concurring.

*In the matter of the Petition of A. A. HYDE for a Writ of Habeas Corpus.*

47	277
57	396
57	496
47	277
62	586

**DISTRICT COURTS — Jurisdiction — Claim Against Decedent's Estate.** The district courts of this state have jurisdiction to entertain and enforce a demand against property of a deceased person who, by will, devoted almost his entire estate to the perpetuation of a banking business in which he had been engaged during his life-time, and whose continuance he committed to executors named in his will; the claim sought to be enforced in the district court having originated in the course of the banking business, some years after the death of the testator, and after all debts of the testator existing at the time of his death had been paid.

*Original Proceeding in Habeas Corpus.*

THE case is sufficiently stated in the opinion herein, filed November 7, 1891.

---

*In re Hyde, Petitioner.*

---

*Campbell & Dyer*, and *W. E. Stanley*, for petitioner.

*Brooks & Coffin*, for respondent.

Opinion by SIMPSON, C.: This is an application in *habeas corpus*, brought in this court by A. A. Hyde, who claims to be illegally restrained of his liberty by an order of commitment made by the court of common pleas of the county of Sedgwick as for contempt, to enforce an order of that court. Hyde is one of the administrators with the will annexed of the estate of one W. C. Woodman, deceased. The order of the court of common pleas that he refused to obey, on which refusal the order of commitment was issued, was one made in an action against the executors of the estate of Woodman, commanding him to deliver to a receiver appointed in that action the property described in the order belonging to said estate. The material facts are, that in his life-time W. C. Woodman was engaged in the banking, loan and investment business in the city of Wichita, under the name of W. C. Woodman & Son, otherwise the First Arkansas Valley Bank. W. C. Woodman was the sole owner of the business. Woodman died on the 27th day of December, 1887, having disposed of all his property by a will that was probated on the 14th day of January, 1888; and on that day Elizabeth Woodman, his widow, and W. S. Woodman and U. S. Grant Woodman, his sons, were qualified as executors, having been named as such in the will. By the express provisions of the will, all the property, real, personal, and mixed, of the deceased, except the homestead occupied by the family, was devised to the executors in trust as the capital of the First Arkansas Valley Bank of W. C. Woodman & Son, and the executors were directed to continue said banking business for the term of 20 years after the death of the said W. C. Woodman.

It seems, from a cursory examination of the terms of the will, that the conduct and management of the banking business to be conducted by the executors was one of almost unlimited discretion on their part. There seem to be no limitations or

---

Opinion of the Court.

---

conditions attached to the control of the executors in the transaction of the business. Nor does it appear but that the whole estate, of every kind and description, except some specific legacies, was to be used as the capital and resources of the banking business. From the date of their qualification until the 4th day of February, 1891, these executors continued the business, receiving deposits, making loans and investments, buying and selling exchanges, and in detail transacting a general banking, loan and investment business. On the 4th day of February, 1891, the bank, being unable to pay its current obligations, closed its doors and suspended payment, owing debts exceeding the sum of \$100,000, all of said debts having been contracted since the death of W. C. Woodman. All indebtedness of Woodman contracted prior to his death had been paid, and the statutory period within which such claims could have been presented and allowed in the probate court had expired before the 4th day of February, 1891. After the failure of said bank, on the 4th day of February, 1891, and prior to the commencement of the action in which the order of commitment was issued, the said Elizabeth Woodman and the other executors named in the will were removed by the probate court of Sedgwick county, and the petitioner, A. A. Hyde, and U. S. Grant Woodman were appointed administrators with the will annexed of said estate, and took possession of the assets thereof, and proceeded to the administration of said estate. After the appointment of said administrators, a large number of the creditors of said estate, whose claims grew out of the banking business as conducted by the executors, presented their claims for allowance in the probate court. On the 23d day of April, 1891, the National Bank of Kansas City, Mo., filed its petition in the court of common pleas of Sedgwick county, on its own behalf and on behalf of all other creditors of said bank similarly situated, against the executors, administrators with the will annexed, legatees, and other beneficiaries under the will, praying the appointment of a receiver to take charge of the assets of said bank. On the 13th day of June, 1891, one W. D. Keyes, who claims to be the owner

---

*In re Hyde, Petitioner.*

---

of a judgment recovered by T. B. Wall, one of the depositors of said bank, against Elizabeth Woodman, W. S. Woodman, and U. S. Grant Woodman, individually and as executors and trustees, by leave of the court filed his cross-petition in said action, and joined with the plaintiff therein in the application for the appointment of a receiver in that cause. On the 24th day of June, 1891, the district court appointed one Frank W. Oliver receiver in the action of the Bank *v.* Elizabeth Woodman *et al.* of all the assets, real estate, property, equitable interests, things in action, chattels and effects of every kind and nature belonging or in any way appertaining to the estate of W. C. Woodman & Son, otherwise the First Arkansas Valley Bank, of Wichita, Kas., vesting the said Oliver with all the rights and powers of a receiver in equity, and ordering the defendants to turn over all the property in their possession or under their control to him. Oliver filed his oath on the 27th day of June, and filed a bond approved by the court on the same day. Hyde, as one of the administrators with the will annexed, refused to turn over property of the estate in his possession to the receiver. He was attached for contempt, and filed his reasons in writing for his failure to comply with the order of the court, and was adjudged guilty of contempt, was fined \$100, taxed with the costs of the attachment proceedings, and committed to the jail of Sedgwick county until he obeys the order of the court and surrenders to the receiver the property of the estate in his custody. The commitment was dated on the 25th day of July, 1891.

The principal contention of the attorneys for the petitioner is based upon the assertion that the court of common pleas of Sedgwick county had no jurisdiction to entertain the action of the Kansas City bank, and to appoint the receiver; that the claim of the bank was one against the estate of Woodman, of which the probate court of Sedgwick county had primary and exclusive original jurisdiction. On the other side, it is said that the claim of the Kansas City bank is one against the Woodman bank, and not against the Woodman estate; that it originated long after the death of Woodman, and is not a claim

## Opinion of the Court.

properly against the estate, and is of that nature that the machinery, practices and usages of the probate court are not sufficient to properly enforce. This preliminary statement appears to be sufficient to develop the consideration that must control us, which is, that if the court of common pleas of Sedgwick county had, upon the facts presented, jurisdiction of the subject-matter of the action, its order appointing a receiver, however erroneous, will not be reviewed by this court on a *habeas corpus* proceeding. (*In re Morris*, 39 Kas. 28; *In re Petty*, 22 id. 477; *In re Dill*, 32 id. 668.) This court has said, in the case of *Shoemaker v. Brown*, 10 Kas. 383, that—

“The district courts of the state have jurisdiction concurrent with the probate courts over certain matters relating to the estates of deceased persons; and, in the exercise of their equity or chancery jurisdiction, the district courts may entertain and determine actions to foreclose mortgages where the defendant is a legal representative of a deceased person, or any other proper proceeding over the estates of deceased persons, and over the legal representatives and heirs of decedents.”

It is further said in that case, that the district courts of this state have full chancery powers, and that courts of equity have always had a paramount jurisdiction over the estates of deceased persons; that these powers are not taken away by the statutes regulating the duties and defining the powers and jurisdiction of the probate court. This has been maintained in many other cases, and it must be held to be settled law in this state that, when certain facts exist, growing out of the liabilities of a deceased person, or it may be arising out of the settlement of the estate of a deceased person, wherein the probate court, by reason of its limited jurisdiction and restricted authority, cannot protect and enforce the rights of all persons involved in the controversy, the equitable power of the district court may be invoked in their behalf. In the case of the *Kansas City Bank v. Elizabeth Woodman et al.*, out of which this controversy grows, there are two questions that sufficiently support the jurisdiction of the district court to entertain the action. One of these is, that the claim sued upon is not one

---

*In re Hyde, Petitioner.*

---

against the estate of W. C. Woodman, deceased, because it originated long after his death, in the course of that banking business which he sought to perpetuate by the terms of his will, and strictly speaking is a claim against the assets of the bank, these assets being held in trust for banking purposes; and the other is, that it is an admitted fact on the hearing that all claims against the estate of Woodman that existed at the time of his death have been paid. It seems apparent that by the terms of the will the property enumerated in that instrument was a fund set aside and solely appropriated to the banking business to be conducted after his death by his executors; that it was a trust fund for the purpose of carrying on such banking business, and by the clearest principles of equity the debts contracted in the operation of such business must be paid out of such funds to the exclusion of other debts or to the claims of the heirs. The ordinary proceedings of the probate court are inadequate to the task of determining the many questions that may arise, and its restricted process and limited powers not sufficient for all the purposes of such a litigation. The primary jurisdiction in such cases rests with the district court. The court of common pleas of Sedgwick county having jurisdiction of the persons and the subject-matter of the action, we cannot say that the order appointing a receiver was absolutely void, and it follows that the petitioner must be remanded to the custody of the sheriff.

By the Court: It is so ordered.

All the Justices concurring.

THE BOARD OF COMMISSIONERS OF HARPER COUNTY *et al.* v. THE STATE OF KANSAS, *on the relation of T. J. Beebe, County Attorney.*

47	283
50	356
47	283
68	106
47	283
81	94
81	156

COUNTY BOARD—*Control of County Printing—Injunction.* Under § 1655 of the General Statutes of 1889, the boards of county commissioners of the several counties of the state have exclusive control over the county printing; and, in the absence of fraud or collusion, injunction will not lie to restrain the board from paying for such county printing at legal rates, although other parties may have been willing and did offer to do the county printing for a less sum than the amount fixed by law for doing such work.

*Error from Harper District Court.*

THE opinion states the case.

*Love & Snelling*, and *Geo. E. McMahon*, for plaintiffs in error.

*T. J. Beebe*, county attorney, *H. C. Finch*, *H. Parke Jones*, and *Shepard, Cherry & Shepard*, for defendant in error.

Opinion by GREEN, C.: This was an action for an injunction, brought upon the relation of the county attorney, against the board of county commissioners of Harper county. The petition alleged that on the 9th day of January, 1891, the board of county commissioners entered into a contract with J. R. and S. C. Hammond, the proprietors of the *Anthony Journal*, by the terms of which it was agreed that, for the period of one year then next ensuing, all the county printing should be done by the Hammonds, at legal rates; that at the time of the making of such contract the board of county commissioners had bids from two other newspaper publishers to do the county printing at much less than legal rates. It was claimed by the relator that the contract was void, for the reason that the board of county commissioners had no authority to make the same. The defendants below filed a general demurrer to the petition, which was overruled by the district court. The defendants elected to stand on their demurrer and declined to plead further to the



petition, and objected to the granting of a temporary injunction, for the reason that if the plaintiff was entitled to any order, it was a permanent injunction. A temporary injunction was granted; and this is assigned as error, together with the overruling of the demurrer of the defendants to the petition of the plaintiff below, upon the ground that the petition did not state facts sufficient to constitute a cause of action against the defendants, or to entitle the relator to any relief.

Was the board of county commissioners authorized to make a contract at legal rates? Paragraph 1655 of the General Statutes of 1889 reads: "The boards of county commissioners of the several counties of this state shall have exclusive control of all expenditures accruing either in the publication of the delinquent tax list, treasurer's notices, county printing, or any other county expenditures." This section originally contained this proviso: "*Provided*, That all county printing shall be let to the lowest responsible bidder;" but in 1872 it was amended by dropping off this proviso. By the statutes of 1868, the commissioners had the exclusive control of the county printing, with the condition that it must be given to the lowest responsible bidder. The legislature removed this restriction in 1872, but the board of county commissioners still had exclusive control of the county printing. In construing this section of the statutes, in the case of *Quigley v. Comm'rs of Sumner Co.*, 24 Kas. 293, Mr. Justice BREWER said:

"Referring again to the section defining the powers of county commissioners, we find that it gives them 'exclusive control of all expenditures.' Does this mean simply that they are to audit accounts? Or does it not also give them power in the creation of debts? It seems to us, the latter. It grants general control as to county expenditures, both as to items, amounts, and parties."

In *Mooers v. Smedley*, 6 Johns. Ch. 28, which was a case to enjoin the supervisors of a town from the allowance of certain bounties for wolf scalps to non-residents of the town, and alleging that the bounties were confined to residents, and that

## Opinion of the Court.

by such action of the supervisors the tax of the plaintiff was greatly augmented, the law gave the supervisors authority "to examine, settle and allow all accounts," etc. Chancellor Kent said: "I cannot find, by any statute, or precedent, or practice, that it belongs to the jurisdiction of chancery, as a court of equity, to review and control the determination of the board. . . . This power implied and required the exercise of sound judgment. . . . This is not the case of a private trust, but the official act of a political body; and in the whole history of the English court of chancery there is no instance of the assertion of such jurisdiction as now contended for." (*Walton v. Develing*, 61 Ill. 201; *Darst v. The People*, 62 id. 306.) It is important to observe that courts of equity do not interfere by injunction for the purpose of controlling the action of public officers constituting inferior, quasi-judicial tribunals, such as boards of supervisors, commissioners of highways, and the like, on matters properly pertaining to their jurisdiction; nor will they review and correct errors in the proceedings of such officers. (High, Inj., § 1311; Mechem, Pub. Off., § 991.)

Section 21 of article 2 of the constitution provides that "the legislature may confer upon tribunals transacting the county business for the several counties such powers of local legislation and administration as it shall deem expedient." Under this power the legislature has given to the board of county commissioners the exclusive control of the county printing. The statute fixes the legal rates for such printing, so that the only existing restriction is that the printing cannot be let at more than the amount fixed by law. The only question, therefore, is whether or not there should be an interposition upon the part of the courts when it appears that the printing might have been done for a less sum. The board of county commissioners not only possesses the discretionary power, but the statute has given to that tribunal the exclusive control over the subject-matter; and, in the absence of actual fraud, courts cannot interfere with such discretion and power.

As we have seen, up to 1872 the statute required that the

---

Comm'rs of Harper Co. v. The State, *ex rel.*

---

county printing should be let to the lowest responsible bidder; it was then changed by striking out this proviso. So that the control was practically unlimited, except as to the compensation, which was fixed by law. Before 1872, they must (since, they may) let to the lowest bidder. Taking away a limitation in the one direction does not place a limitation in the opposite. Taking away a restriction upon full discretion leaves the discretion full and free, and does not superimpose another restriction. (*Quigley v. Comm'rs of Sumner Co.*, *supra*.)

The case at bar is different in principle from the case of *National Bank v. Comm'rs of Barber Co.*, 43 Kas. 648. In that case the board made another contract; in this no effort has been made by the board to change the terms of the agreement, or to designate any other paper in which the county printing should be done; hence we think that, in the absence of any fraud or collusion, the determination of the board is conclusive in all matters wherein it has the exclusive power, and such discretionary power has been exercised with an honest purpose and within the authority conferred upon it by the constitution and the laws enacted thereunder; and the courts have no authority to interfere by injunction so as to control such discretionary power, or restrain the board from the payment of claims for printing already done under contract.

We think the preliminary injunction should be discharged.

We recommend a reversal of the judgment of the district court.

By the Court: It is so ordered.

All the Justices concurring.

THE BOARD OF COMMISSIONERS OF SEWARD COUNTY  
v. A. K. STOUFER.

47	287
48	834
47	287
161	191

1. COUNTY PRINTING—*Setting Aside Contract.* Mere threats by county commissioners to ignore and set aside a contract let by them for the county printing, in the absence of any official offer or attempt to ignore or set aside such contract, do not constitute grounds for an injunction.
2. INJUNCTION, *When.* Some step must be taken by the commissioners as a board toward setting aside the contract before an injunction can issue.

*Error from Seward District Court.*

THE case is stated in the opinion.

*Jas. K. Beauchamp*, county attorney, for plaintiff in error.

*Jno. H. Pitzer*, for defendant in error.

Opinion by STRANG, C. November 17, 1890, a proposition to do the county printing for Seward county was submitted to the county board of that county, as follows:

"By the *Arkalon News* and the *Liberal Lyre* to the Hon. Board of County Commissioners of Seward county, Kansas: The above-named papers hereby offer and agree to do all the county printing for the county of Seward and state of Kansas, from the 17th day of November, 1890, to December 31, 1892, at the following rates, viz.: All the printing, including commissioners' proceedings, clerk's notices, treasurer's notices, and sheriff's notices, at \$1 per square of 250 ems nonpareil; all job work that can be furnished by said papers at prices paid for said work by the county clerk, for a period dating from July 1, 1890, to November 17, 1890. Tax lists at legal rates allowed. The *Arkalon News* to be named as the official paper, the editor of which shall furnish all necessary affidavits.

A. K. STOUFER, *Arkalon News*.

H. V. NICHOLS, *Liberal Lyre*."

Which said proposition was accepted by the board. January 17, 1891, the board of county commissioners, again being in session, on motion ratified the former action of the commis-

sioners in accepting said proposition, and thereby entered into a contract with the plaintiff below as editor and proprietor of the *Arkalon News*, and H. V. Nichols as editor and proprietor of the *Liberal Lyre*, whereby they agreed that the plaintiff below and said H. V. Nichols should jointly do the county printing for said county, upon the terms contained in said proposition, for the period from November 17, 1890, to December 31, 1892.

April 11, 1891, the plaintiff below commenced this action, and alleged in his petition that the said board of county commissioners, "without any cause or excuse therefor, are threatening and are about to ignore and set aside their said contract, and award said public printing to the *Liberal Lyre* and the *Springfield Republican*." A temporary injunction was allowed by the judge of the district court of said county. Afterward, on the 9th day of June, 1891, when the case came up for trial in the district court, the defendant objected to any further proceedings in the case, for the reason that the petition did not state facts sufficient to entitle the plaintiff to any relief. The objection was overruled, and the injunction made perpetual. Motion for new trial was filed, and overruled. The case is here for review, and the question is, does the petition state facts sufficient to entitle plaintiff below to any relief?

We think it does not. The petition simply alleges that the defendants, the county commissioners, are threatening and are about to ignore and set aside the contract for the county printing, entered into by them with the plaintiff below and the editor of the *Liberal Lyre*. It nowhere discloses any action by said county commissioners as a board calculated in any way to interfere with said contract. It sets forth no resolution, motion, or other official action of said commissioners, nor even the calling of a meeting for the purpose of rescinding said contract. Mere threats by the commissioners to ignore and set aside the contract, without any offer or attempt to do so, do not constitute grounds for an injunction to restrain them from so doing. (*Bridge Co. v. Comm'rs of Wyandotte Co.*, 10 Kas.

## Beverly v. Fairchild.

326; *Challiss v. City of Atchison*, 39 id. 276; *Troy v. Comm'rs of Doniphan Co.*, 32 id. 507; *Andrews v. Love*, 46 id. 264.)

It is recommended that the judgment of the district court be reversed, and the case remanded for new trial.

By the Court: It is so ordered.

All the Justices concurring.

J. L. BEVERLY v. WM. FAIRCHILD *et al.*

47 289  
56 316

**MORTGAGE — Foreclosure — Personal Judgment.** Where an action is brought for the foreclosure of a real-estate mortgage and a personal judgment upon the notes secured thereby against the purchaser of the mortgaged premises, who has assumed the payment of the notes secured by the mortgage, and the makers of the notes and mortgage, the failure to indorse the summons, as in an action for the recovery of money only, will not render the personal judgment against such purchaser, or the makers of the notes and mortgage, void.

*Error from Shawnee District Court.*

ON the 25th day of April, 1887, S. N. Burgen and wife and A. J. Arnold and wife, for the consideration of \$7,000, executed a deed to J. L. Beverly for lots 381, 391, and 393, on Kansas avenue, in Holzle's addition to the city of Topeka, and also for a certain tract of land adjoining said lots. In the deed, which Beverly accepted, was the statement that Beverly assumed to pay two notes secured by a mortgage upon the premises, amounting to \$4,000. On the 22d day of September, 1888, Wm. Fairchild and John Higginbotham commenced their action against A. J. Arnold and wife, S. N. Burgen and wife, and J. L. Beverly, to foreclose the mortgage of \$4,000 mentioned in the deed of the 25th of April, 1887, upon the premises purchased by J. L. Beverly, and also to recover a personal judgment against all of the defendants for the amount of the notes secured by the mortgage. At the commencement

---

Beverly v. Fairchild.

---

of the action a summons was issued and served upon the defendants, but there was no indorsement thereon for the amount claimed or any amount. J. L. Beverly made no appearance, but a personal judgment was rendered against him, as also against the other defendants. The judgment, with interest, amounted to \$4,193. Afterward, the mortgaged premises were sold to Fairchild and Higginbotham for \$2,135, and subsequently an execution was issued and a levy made upon the individual property of J. L. Beverly. The premises levied upon under this execution were not embraced in the mortgage. On the 23d of April, 1889, *J. L. Beverly* commenced his action against *Wm. Fairchild*, John Higginbotham, and A. M. Fuller, the sheriff of Shawnee county, to prevent them from selling or causing to be sold the real estate levied upon under the execution issued against him, but which real estate was not embraced in the mortgage. On the 24th of April, 1889, the defendants filed their answer. Subsequently, J. L. Beverly filed his reply. Trial had on 24th of April, 1889, before the court without a jury. The injunction was denied, and the defendants recovered a judgment for costs. Beverly filed his motion for a new trial, which was overruled. He excepted to the judgment and rulings of the court and brings the case here.

*M. E. Matthews*, for plaintiff in error.

*Vance & Campbell*, for defendants in error.

The opinion of the court was delivered by

HORTON, C. J.: The mortgage which was foreclosed was dated the 18th of March, 1887. J. L. Beverly purchased the premises mortgaged on the 25th of April, 1887, and assumed the payment of the mortgage. He was therefore the owner of the premises subject to the mortgage lien, and entitled to the possession of the same. When the action was commenced by Wm. Fairchild and John Higginbotham, on the 22d day of September, 1888, to foreclose the mortgage and obtain personal judgments, Beverly was a necessary party defendant in

the foreclosure proceedings. It was decided by this court long ago that, in an action to recover upon a note and foreclose a mortgage given to secure the same, no indorsement was required on the summons, it not being an action for the recovery of money only. (Civil Code, § 59; *George v. Hatton*, 2 Kas. 333; *Weaver v. Gardner*, 14 id. 347.) Therefore, we think in this case, considering the action and the judgment rendered, that the failure to indorse the summons did not make the judgment void. (*Simpson v. Rice*, 43 Kas. 22; *Friend v. Green*, 43 id. 167.)

If the plaintiffs in the original action had wholly disregarded the mortgage, and brought their action against Beverly only upon his promise to pay the notes secured by the mortgage, the action might then have been considered one for money only, and in such a case an indorsement of the summons would have been necessary; but such was not the action which was commenced.

The judgment of the district court will be affirmed.

All the Justices concurring.

47	291
49	218

## THE STATE OF KANSAS V. JOHN ESTLINBAUM.

1. **INTOXICATING LIQUOR—Unlawful Sale—Competent Juror.** In a criminal prosecution, where the defendant was charged with keeping and maintaining a nuisance, to wit, a place for the sale of intoxicating liquors, a person who was called as a juror was shown by his own testimony to be a member of an organization called the "Good Templars," whose object was as follows: "He did not understand the special object of such organization to be the enforcement of said [prohibitory liquor] law among others, but to promote temperance among its members by moral suasion." *Held*, That such person was not shown by the foregoing to be incompetent to serve as a juror in the case.
2. ——— **Evidence.** And in such a case it is not error for the trial court to permit the prosecution to introduce evidence of other sales



---

The State v. Estlinbaum.

---

of intoxicating liquors than those of which the county attorney or the prosecuting witness had knowledge prior to the commencement of the prosecution.

*Appeal from Geary District Court.*

THE opinion states the facts.

*John O. Marshall*, for appellant.

*John N. Ives*, attorney general, and *James V. Humphrey*, county attorney, for The State.

The opinion of the court was delivered by

VALENTINE, J.: This was a criminal prosecution instituted originally before a justice of the peace of Geary county upon a complaint containing two counts, the first charging the defendant, John Estlinbaum, with the offense of unlawfully selling intoxicating liquors; and the second charging him with the offense of unlawfully keeping and maintaining a common nuisance, to wit, a place where intoxicating liquors were kept for unlawful sale and barter. The defendant, having been tried, found guilty and sentenced in the justice's court, appealed to the district court, where he was again tried, and he was there acquitted upon the first count and convicted upon the second; and he was then sentenced upon the second count to pay a fine of \$200, and to be imprisoned in the county jail for 30 days, and the nuisance was ordered to be abated; and the defendant now appeals to this court.

In this court the defendant claims that the court below erred as follows: (1) In overruling his challenges of the jurors Durland and Cormack; (2) in permitting evidence to be introduced on the part of the state tending to show sales of which the prosecuting witness had no knowledge; (3) in giving the sixth and ninth instructions. We shall consider these alleged errors in their order.

I. The challenges of the jurors Durland and Cormack were for cause, and for the alleged reason that they were not impartial jurors for the following reasons: It appeared that they

belonged to an organization called the "Good Templars," the object of which, as shown by the testimony of one of such jurors, was as follows: "He did not understand the special object of such organization to be the enforcement of said [prohibitory liquor] law among others, but to promote temperance among its members by moral suasion." This certainly does not show that the jurors were not impartial, or that they could not try the case impartially, or that they were in any manner incompetent. These two jurors were afterward challenged peremptorily and their places were then filled with other jurors, and the defendant afterward exhausted all his peremptory challenges.

II. The second and third alleged errors present only one question of law, and that is, whether the state had the right, in order to prove the charge set forth in the second count of the complaint, to prove that the defendant made other sales of intoxicating liquors at the place charged to be a nuisance than those of which the prosecuting witness had knowledge. Such evidence was introduced, and the defendant claims that it was incompetent and prejudicial, and cites the case of *The State v. Brooks*, 33 Kas. 708, as authority for his contention. That case, however, can have no possible application to the present case. The *gravamen* of the offense charged in the Brooks case was the *unlawful selling* of intoxicating liquors; while the *gravamen* of the offense charged in the present case is the *unlawful keeping of a place* for the sale of intoxicating liquors. In that case it was absolutely necessary to prove an unlawful sale, and to prove the very one which was in effect charged in the complaint; while in the present case it was not necessary for the state to prove any sale, but only to prove that the defendant *kept a place for the unlawful sale* of intoxicating liquors; but in order to prove that the defendant kept such a place, and that the liquors were in fact *kept for sale*, the state had the right to prove that the defendant actually sold them at such place. The case of *The State v. Reno*, 41 Kas. 674, 684, No. 8 of the syllabus and the opinion, is applicable to this case, and is against the defendant's contention.

---

Pickens v. Taylor.

---

In a case like the present the state may prove as many sales as it chooses, provided they are unlawful sales of intoxicating liquors made by the defendant at the place charged, and it makes no difference whether the county attorney or prosecuting witness knew of such sales or not prior to the commencement of the prosecution.

The judgment of the court below will be affirmed.

All the Justices concurring.

---

RICHARD PICKENS *et al.* v. DAVID TAYLOR.

CORPORATION—*Rights of Stockholders and Creditors.* T. and P. were members of a corporation. The company, being in debt, conveyed its real estate to P., in trust, upon which to borrow money to pay indebtedness, but P. afterward refused to recognize the trust, and claimed the property as his own. T. was an indorser and guarantor of the company, and to protect himself was compelled to take an assignment of a judgment obtained by a creditor against the company. He caused a levy to be made upon the property transferred to P. and also began proceedings to cancel and set aside the conveyance to P., and to have the property subjected to the payment of his judgment. P. claimed that the company was owing him a large sum of money. Afterward the land was sold on execution levied at the instance of T. A sale was fairly and regularly made of the property to T., was confirmed by the court, and a sheriff's deed made to the purchaser. Afterward, P. proposed to pay T. the amount of his claim, but no actual tender was made, nor was any proposal made until after the claim was extinguished by the sale and conveyance of the property to T. On the trial the issues were found in favor of T. P. then asked the court to fix a short time within which he could pay off T.'s judgment and take the land free from the lien of such judgment, but the request was refused, and a judgment canceling the deed of the company to P. was entered. *Held*, That the refusal and entry of judgment were not erroneous.

*Error from Morris District Court.*

THE opinion contains a sufficient statement of the case.

*Kellogg & Sedgwick*, for plaintiff in error.

*J. Jay Buck*, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J.: This action was brought by David Taylor to set aside a conveyance made by the Dunlap Stone & Lime Company to Richard Pickens, as trustee for the company, which trust it is alleged he violated, and that he was endeavoring to apply the property intrusted to him to his own use and benefit, instead of to the purposes intended by the company. David Taylor was a judgment creditor of the company, and brought the suit, not only to set aside the conveyance, but to prevent Pickens or the corporation from selling or mortgaging the property of the company which he had levied upon to satisfy his judgment, and to have the land adjudged subject to the execution, and that he be permitted to sell it in satisfaction of his judgment. There were charges of fraud and collusion made against Pickens and the company in absorbing the property of the company for the payment of fictitious claims, and in endeavoring to defeat the plaintiff below in obtaining satisfaction of his claim and judgment. The case was here before, and the nature and allegations of the same have been fully stated. (*Taylor v. Stone Co.*, 38 Kas. 547.) There were counter-charges of fraud made against Taylor, who was a member of the corporation and assisted in its organization, but the final trial of the case has resulted in Taylor's favor, and the general findings which have been made sustain the allegations made against the plaintiffs below, and overthrow those made against Taylor.

The testimony in the record is sufficient to sustain the findings and judgment of the court. It was adjudged and decreed that the conveyance made by the company to Pickens was invalid, and that the company was the owner of the land at the commencement of the suit, subject only to a lien in favor of the Kansas Loan & Trust Company for \$109.25, with interest, and therefore subject to sale to satisfy the judg-

---

Pickens v. Taylor.

---

ment and execution of the defendant in error. It appears that the land was sold under the execution to Taylor on July 27, 1886; the sale was confirmed by the court on October 15, 1886; and October 30, following, a sheriff's deed was executed to Taylor in accordance with the direction of the court. There is testimony offered by the plaintiffs in error, that after the sale and conveyance to Taylor they proposed to pay Taylor the amount of his claim, and they asked the court to fix a short time after judgment in which Pickens could pay off the amount due to Taylor, which the court refused. This refusal is substantially the only objection made against the judgment of the court below. It does not appear, however, that a tender of the money was actually made, nor was any specific amount named or proposed to be paid. Neither is it shown that Pickens had any ability to pay the amount of the judgment for which the land was sold. More than that, no proposal to pay Taylor was made until after the judgment had been extinguished by sale and a conveyance of the land. Taylor was a *bona fide* judgment creditor and entitled to have the property of the company subjected to his judgment, and for that purpose was entitled to have any fictitious or fraudulent conveyance held by Pickens against the property canceled and set aside. The property was levied upon as the property of the company, and that it was the property of the company is clearly shown by the testimony. The claim and lien of Taylor appears to have been paramount and superior to that of Pickens, if he held any claim against the company or its property. The sale upon execution appears to have been fair and regular. It was confirmed by the court, and a formal sheriff's deed was executed. By this sale and conveyance he acquired a good title to the land, and no equitable considerations are presented which would require that conveyance to be set aside for the protection of any claim made by Pickens. Under the circumstances of the case it was too late after that conveyance for Pickens to propose to pay Taylor's claim. It had been satisfied and extinguished, and the property in question had effectually passed to the purchaser. Under the find-

ings, it must be taken that the charges of fraud and conspiracy against Taylor are groundless and have been disproved.

We see no reason to disturb the findings and judgment, and hence there must be an affirmance.

All the Justices concurring.

J. G. TENEY *et al.* v. MARY LAING, as *Administratrix* of  
the *Estate of Thomas E. Laing, deceased.*

47 297  
674 284

1. ADMINISTRATION—*Right to Partnership Property—Surviving Partner.*

The administratrix of the estate of a deceased member of a copartnership consisting of two persons has no legal right to take the possession of the property of the partnership from the surviving partner until such surviving partner has been cited for that purpose and neglects or refuses to give the bond required by ¶ 2817, General Statutes of 1889, and until the administratrix of the undivided estate of the deceased partner has given the further bond required by ¶ 2820, General Statutes of 1889.

2. ——— *Erroneous Proceedings by Administratrix.* When the administratrix of the estate of a deceased member of a copartnership consisting of two persons, without citing the surviving partner, and without executing the further bond, commences proceedings in the probate court under ¶¶ 2982, 2983, 2984, 2985, 2986, or under ¶¶ 2821 and 2822, against the surviving partner and other persons, to get possession and control of the partnership property, it is error not to dismiss such proceedings on motion made for that purpose.

*Error from Chautauqua District Court.*

PROCEEDING by *Mary Laing*, as administratrix, against *J. G. Teney* and *H. W. Laing*. Judgment for the plaintiff, on March 6, 1889. The defendants bring the case to this court. The opinion states the facts.

*J. Milton*, and *W. C. Webb*, for plaintiffs in error.

*J. D. McBrian*, *Dan. M. Pile*, and *L. C. Whitney*, for defendant in error.

---

Teney v. Laing.

---

Opinion by SIMPSON, C.: The material facts are, that for years prior to September, 1886, H. W. Laing resided on a farm in Chautauqua county, his family consisting of a daughter, intermarried with J. G. Teney, and a son named Thomas E. Laing. In April, 1886, four months before his death, the son married the defendant in error, and brought her to his father's house, where they lived together until the death of Thomas E. Laing. During all this time, and long before the marriage of Thomas E. Laing, there was a firm doing business—buying, selling and shipping cattle and hogs—under the firm-name of Teney & Laing, with headquarters at the residence of H. W. Laing. After the death of Thomas E. Laing, his widow, Mary, this defendant in error, in consideration of \$750, made a deed to an undivided half interest in a tract of land to Jacob G. Teney, this land being subject to a mortgage of \$1,500; and it seems, from the evidence, that the land conveyed was the tract upon which the residence of all these parties was situated. After the conveyance, Mary Laing, the widow, resided in the state of Colorado for about 18 months, and then returned to Kansas and took out letters of administration on the estate of her deceased husband. Thomas E. Laing died on the 5th day of August, 1886, and letters of administration were granted to his widow on the 5th day of March, 1888. She caused an inventory and appraisement to be made of his personal estate, as well as the partnership estate of Teney & Laing, the firm that had been engaged for years in the cattle business, on the theory or claim that her deceased husband was a member of that firm. This appraisement was made on the 29th day of March, 1888. On the 2d day of April, 1888, she made complaint and an application for citation to the probate court as follows:

“Now comes Mary Laing, administratrix of the estate of Thomas E. Laing, deceased, and makes complaint against said defendants, and says: That said defendants, Jacob Teney and H. W. Laing, have concealed and conveyed away and still conceal certain moneys, goods, chattels, effects, rights and credits of the said Thomas E. Laing, deceased, and have refused

## Opinion of the Court.

and still refuse to deliver the same to said administratrix, and she therefore asks that a citation issue to said defendants to appear forthwith before this court to be examined on oath touching the money, goods, chattels, property and effects of said Thomas E. Laing, deceased, in their hands or concealed, conveyed away by them, or within their knowledge.

MARY LAING,

*Administratrix of the estate of Thomas E. Laing, deceased.*

"By L. C. WHITNEY, and MCBRIAN & PILE,  
*Her Attorneys.*"

A citation was issued to Jacob G. Teney and H. W. Laing, and personally served on them by the sheriff on the 3d day of April, 1888, requiring them to appear in the probate court on the 5th day of April, 1888, to be examined on oath touching the moneys, property, goods and chattels conveyed away by them, belonging to the estate of Thomas E. Laing, deceased. On the 30th day of April, 1888, a notice was served on J. G. Teney and H. W. Laing that on the 10th day of May, 1888, at 10 o'clock A. M., the administratrix would apply to the probate court for an order requiring them to turn over to her the money and property in their hands belonging to said estate. On the 10th day of May the administratrix filed a written motion asking the probate court to make such an order. On that day the probate court heard the motion and overruled it, and to this order notice of appeal was given in open court, and affidavit for appeal filed, and a transcript of these proceedings was filed in the district court.

These proceedings were instituted under the first five paragraphs of article 10 of the act respecting executors and administrators. (Gen. Stat. of 1889, pp. 876, 877.) The transcript of the proceedings of the probate court filed in the district court, and made a part of the record in this court, does not show that ¶ 2984 was complied with, that requires "all such examinations, including as well questions and answers, shall be reduced to writing, and the answers shall be signed by the party examined, and filed in the court before which the same is taken." It does not show that either of the persons who were cited, or any other person, was ever examined as a witness.



---

Teney v. Laing.

---

It does not show that the probate court ever passed upon the question of the guilt of the persons cited of either having concealed, embezzled or conveyed away any moneys, goods, chattels, things in action or effects of the deceased, or that there was ever any hearing upon that question. The only question ever passed upon by the probate court was the refusal to make an order requiring Teney and Laing to turn over any property belonging to the estate. The complaint itself does not charge them with the embezzlement or conveying away of any of the partnership estate; it is confined by its phraseology to the personal estate of Thomas E. Laing.

In the district court these plaintiffs in error moved to dismiss the proceeding because the court had no jurisdiction of the subject-matter of the proceeding, and because it had no jurisdiction of the parties defendant. This motion was overruled, and exceptions taken. The case was then tried by a jury, the question in issue being whether H. W. Laing or the deceased, Thomas E. Laing, was a member of the firm of Teney & Laing. The jury returned a verdict in the words and figures following, to wit:

"We, the jury impaneled and sworn in the above-entitled case, do, upon our oaths, find for the plaintiff, and find the property concealed to consist of 25 cows, 11 two-year-old steers, 25 yearlings, 32 two-year-old steers and heifers, 10 horses and 8 mules, 2 colts, 20 hogs, 1 wagon, 1 pleasure carriage, 3 cultivators, 2 plows, 2 sets leather harness, 1 set chain harness, and \$500 worth of notes given to Thomas E. Laing for cattle sold in Missouri." (Signed by the foreman.)

A motion for a new trial was made and overruled. A motion in arrest of judgment was filed and overruled. The court ordered the plaintiffs in error to turn over the property enumerated in the verdict of the defendant in error, and upon their failure ordered them committed to the jail of the county until said order was complied with. The plaintiffs in error filed a motion for a stay of execution until the cause could be reviewed in the supreme court, and tendered a bond with good and sufficient sureties to stay execution pending proceedings

for review. The court overruled the application for a stay of execution, and refused to accept the bond on the ground that no stay of execution is permitted in cases of this kind. Numerous errors are assigned by counsel for plaintiffs in error, but it will be necessary for us to notice but few of them.

Under the administration laws of this state, as declared by the statutes upon executors and administrators, and as these statutes have been interpreted by this court, the primary right to settle the affairs of a partnership consisting of two persons, when one of the members of the firm dies, rests with the surviving partner; but if the surviving partner, after having been duly cited for that purpose, neglects or refuses to give the bond required, the administrator of the personal estate of the deceased partner may execute the bond required by ¶ 2820, General Statutes of 1889, and take the whole partnership property into possession, collect the debts due the late firm, pay those due from the late firm, and pay over to the surviving partner his proportion of the excess, if any there be. In this case the record does not show that Jacob G. Teney was ever cited to give the bond required from a surviving partner, nor does the record show that Mary Laing, as administratrix of the estate of Thomas E. Laing, ever executed the further bond required by ¶ 2820, General Statutes of 1889, that is necessary to authorize her to take possession of and administer the partnership estate. Both sides and all parties concede that Jacob G. Teney was a member of the firm of Teney & Laing; the controversy was whether H. W. Laing or Thomas E. Laing was the other member. As surviving partner, Jacob G. Teney had the undoubted legal right to the possession of all the partnership property at the death of Thomas E. Laing, if he was a member of the firm, until he had been cited to give bond and refused, and until the administratrix of Thomas E. Laing had given a bond that would protect his interests in the partnership estate. If H. W. Laing was the partner of Teney, of course the administratrix of Thomas E. Laing had no possible control over or interest in the partnership assets. If these proceedings were valid, and

---

Teney v. Laing.

---

complied with the law in all respects, no such order as was made in this case could be rightfully made against H. W. Laing without some positive evidence that he was withholding, concealing or conveying away this partnership estate, or some portion thereof. We have read this record carefully to find some active or even passive action or declaration, movement or transaction of H. W. Laing tending to show either possession, control or disposition of any of this partnership estate. Jacob G. Teney claims that H. W. Laing was and is his partner. H. W. Laing himself was not permitted to testify in his own behalf on the trial of the cause. This court, in the case of *Blaker v. Sands*, 29 Kas. 551, upon the question of the right of possession of the surviving partner, uses this language:

"Upon the death of a partner the survivor becomes a trustee for all concerned. He holds the legal title to all the personal property, chuses in action and other assets of the firm, and his control of all the partnership assets, real and personal, legal and equitable, is absolute and indefeasible, limited only by the purposes for which it is granted to him, and the provisions of the statute concerning partnership estates. Until the plaintiff was cited under the provisions of § 35, chapter 37, Comp. Laws of 1879, to give bond as a surviving partner, he had the right to the possession of the partnership property. [Citing *Carr v. Catlin*, 13 Kas. 393.] The citation was a matter personal to the surviving partner, and it was an act required to be done to divest him of his right to control and dispose of the property. Unless he was cited or voluntarily appeared in court and refused to give the statutory bond, or in some other way declined to take charge of the partnership property, so as to waive a citation, he was never divested of his control over said property."

In the case cited, that of *Carr v. Catlin*, this court says:

"The citation is jurisdictional in the sense a summons is. It brings the party into court. But when a party voluntarily appears in court, it is unnecessary to inquire what, if any, process has been served upon him."

It is also said in this case that the surviving partner may insist on his possession of the partnership property until after citation, and a refusal or neglect to give a statutory bond.

## Opinion of the Court.

This was the doctrine of the common law. It has been repeatedly held that, upon the dissolution of a firm by the death of one of the members, the survivor has the legal right to the possession and disposition of all the partnership effects for the purpose of paying the debts of the firm and distributing the residue to those entitled. (1 Woerner, Adm'n., § 124, and authorities cited in foot-note No. 6.) By the language of ¶ 2819 of the General Statutes of 1889, it is expressly provided that in case the surviving partner, having been duly cited for that purpose, shall neglect or refuse to give the bond required by this article, the executor or administrator of the estate of such deceased partner, on giving a bond as provided in the next section, shall forthwith take the whole partnership estate, etc., into possession. Paragraph 2820 prescribes the condition of such a bond. It seems that the giving of the further bond required by this statute is a condition precedent to the taking possession of the partnership estate by the administrator of the deceased partner. The supreme court of the state of Missouri, in the cases of *Bredlow v. Savings Association*, 28 Mo. 181, recognized in *Savings Association v. Enslin*, 37 id. 453; *Holman v. Nance*, 84 id. 674; *Easton v. Courtwright*, 84 id. 27; and the court of appeals, in *Weise v. Moore*, 22 Mo. App. 530, hold that the surviving partner is not divested of his common-law powers to wind up the partnership until the administrator of the deceased partner has given bond authorizing him to take charge of the partnership effects, on the survivor's refusal to do so. Now, in this case, it is not shown by the record that the surviving partner was cited, or that the administratrix of the estate of the deceased partner had given the further bond required by our statute, before this proceeding was commenced in the probate court. This proceeding was therefore instituted in violation of plain statutory command and repeated judicial direction, and cannot be maintained, and the district court erred in overruling the motion to dismiss. We might stop here, but cannot refrain from the suggestion that if Jacob G. Teney is the surviving partner, and Thomas E. Laing was the deceased partner of the firm of Teney & Laing,

Swartz v. Large.

¶¶ 2821 and 2822 are the law that ought to have been invoked by the administratrix, if she had herself complied with the other provisions of the statute.

We recommend that the judgment be reversed, and the cause remanded, with instructions to the district court to dismiss the proceedings.

By the Court: It is so ordered.

All the Justices concurring.

### W. H. SWARTZ V. J. A. K. LARGE *et al.*

47	304
69	653
47	304
172	470

COUNTY BOARD — *Recognition of Member — Mandamus.* *Mandamus* will not lie to compel one of the members of a board of county commissioners and the county clerk to recognize a person as county commissioner who has had a judgment rendered against him in a contest proceeding, instituted to determine who was elected to such office, and who has also been ousted from the office by a judgment of the district court in proceedings in *quo warranto*. The peremptory writ of *mandamus* should not issue unless there is a clear and specific legal right to be enforced, and there is no other particular and adequate legal remedy.

#### *Original Proceeding in Mandamus.*

THE opinion states the facts.

*J. K. Beauchamp*, and *A. M. Mackey*, for plaintiff.

*S. B. Bradford*, and *Carskadon, Cobb & Johnson*, for defendants.

Opinion by GREEN, C.: At the election held on the 4th day of November, 1889, in the third commissioner district of Stevens county, W. H. Swartz and J. W. Spoon were the only candidates for county commissioner; and each received 72 votes. The board of county commissioners, sitting as a board of canvassers, decided the tie by lot, and W. H. Swartz

## Opinion of the Court.

received the certificate of election, gave bond, took the oath of office, and entered upon the discharge of his official duties. On the 25th day of February, 1890, Spoon commenced contest proceedings against Swartz, under the provisions of chapter 36 of the General Statutes of 1889. On the 3d day of March, 1890, the contest court decided in favor of Spoon, and ordered a certificate of election to be issued to him, which was accordingly done, and he qualified as commissioner, and entered upon the discharge of his duties at the following April meeting of the board. Swartz had a bill of exceptions allowed and took this contest case to the district court, where it is still pending and undetermined. On the 7th day of August, 1890, Spoon commenced an action in *quo warranto* in the district court of Stevens county against Swartz, for the purpose of settling the question as to who was entitled to the office in dispute; this case was decided in favor of Spoon, on the 22d day of January, 1891, and a final judgment was rendered against Swartz, forever enjoining him from setting up any claim or title to the office in question. This case was not appealed from.

On the 20th day of November, 1890, the plaintiff applied for a writ of *mandamus* in this court to require the defendants, one of whom is commissioner and the other county clerk, to recognize him as county commissioner at all the meetings of the board, and at all other times until such office shall become vacant, or until the plaintiff shall be ousted from such office by due process of law. The alternative writ was allowed. The question for our determination is, whether or not the peremptory writ of *mandamus* shall issue. Courts and text-writers have justly considered the remedy by *mandamus* as one of the highest known to our system of jurisprudence, and the peremptory writ issues only when the legal right to be enforced is clear and specific, and no other adequate remedy exists. The writ should never be granted in doubtful cases. If another action is pending in which the same questions may be determined, the court may, in its discretion, refuse *mandamus*. (High, Extr. Rem., § 9,

---

Swartz v. Large.

---

and cases there cited; Wood, Mand. 17; *Smalley v. Yates*, 36 Kas. 519; *The State v. Mo. Pac. Rly. Co.*, 33 id. 176.) When an office is already filled by a person who has been admitted and sworn, and is in by color of right, a *mandamus* is never issued to admit another person. The proper remedy for the applicant is by proceedings in *quo warranto*. (*Moses*, Mand. 150; *Bonner v. The State*, 7 Ga. 473; *The People v. Scrugham*, 20 Barb. 302; *The King v. Mayor of Colchester*, 2 Durnford & East's Reports, 259.)

In this case both parties claim the office. The defendant instituted contest proceedings and obtained a decision in his favor. The plaintiff obtained a bill of exceptions, and the case is now pending in the district court of Stevens county. After obtaining a favorable decision in the contest court, the defendant instituted proceedings in *quo warranto* and obtained a judgment in the district court of Stevens county ousting the plaintiff from office. That judgment is a finality, unless reversed, and forever settles the question between the plaintiff and defendant as to who is entitled to the office. The plaintiff says that this suit is brought to compel Large, as commissioner, and Davis, as county clerk, to recognize Swartz as commissioner until the contest case and the action in *quo warranto* can be determined in this court. The extraordinary remedy of *mandamus*, as we have seen, will not lie for any such a purpose.

It is recommended that the peremptory writ be denied, and that this action be dismissed at the costs of the plaintiff.

By the Court: It is so ordered.

All the Justices concurring.

GEORGE Z. WORK *et al.* v. T. J. COVERDALE *et al.*

**FRAUDULENT SALE**—*Rights of Bona Fide Purchaser.* Where an insolvent merchant sells his stock of merchandise to defraud his creditors, his vendee, without notice of the fraud at the time of the sale, is protected only to the extent of payments made or security or property appropriated in payment thereof before he obtains knowledge of the fraud of his vendor.

*Error from Pottawatomie District Court.*

THE opinion states the case.

*W. F. Chalkis*, for plaintiffs in error.

*Keller & Noble*, for defendants in error *Ellis & Osborn*.

Opinion by STRANG, C.: On the 11th day of September, 1886, the defendant T. J. Coverdale was a merchant doing business at Havensville, in Pottawatomie county. He had in his possession and was the owner of a large stock of goods. He was indebted to the plaintiffs in the sum of about \$240. On that day he agreed to sell his stock of goods to the other defendants, *Ellis & Osborn*, which sale was fully consummated on the 13th day of said month, by delivering said stock of goods to said *Ellis & Osborn*, receiving from them cash and their separate notes for the purchase-price of the goods. Among the notes given Coverdale for the goods was the note of *Ellis* for \$1,550, payable 10 months from date. This action was brought May 24, 1887, to set aside the sale of the stock of goods by Coverdale to *Ellis & Osborn* and subject said goods to the payment of the debt of the plaintiffs. A jury was waived, and the case was tried by the court, which, among others, made the following finding of fact:

"That about the 1st day of July, 1887, *Ellis* paid the note of \$1,550 which he had given when these goods were purchased, and which was due 10 months after date, to *Ralph Coverdale*, son of T. J. Coverdale, who presented the note to him for payment. He paid it by turning over to *Ralph Cov-*



---

Work v. Coverdale.

---

erdale two notes which he held, one against Ralph Coverdale and one against his brother, amounting to \$600, and paying said Ralph Coverdale \$900 in cash. The money thus collected by Ralph Coverdale was paid by him to his father, of which transaction Ellis had no knowledge."

Plaintiffs claim that, as Ellis & Osborn knew of the indebtedness of T. J. Coverdale to them before this payment of \$1,550 was made by Ellis to Ralph Coverdale, such payment was made in fraud of their rights, to the extent of their claim, and that the second conclusion of law of the trial court is wrong as applied to the ultimate facts found by the court, as they appear from the finding above quoted. We think this contention of the plaintiffs is correct. It is the settled law of this state, that where a merchant sells his stock of goods in fraud of his creditors, the purchaser thereof is protected only to the extent of payments made or securities or property appropriated in payment thereof before he obtains knowledge of the fraud of his vendor. (*Bush v. Collins*, 35 Kas. 535.) But the defendants claim that the \$1,550 note paid by Ellis after the defendants became aware of the character of the sale from Coverdale to them, and after they had learned of his indebtedness to the plaintiffs, was a negotiable note and indorsed by Coverdale to his son, and that therefore the security was in the hands of an innocent purchaser, and under the law was already appropriated to the payment of the debt; and hence the payment of the note to the holder was not in fraud of the right of the plaintiffs. If T. J. Coverdale had in good faith transferred the note by indorsement to his son Ralph, this contention of the defendants would be true. But we do not think the finding of the court shows that the note had been indorsed to Ralph at all. The court finds that the note was presented by Ralph Coverdale for payment, but it also finds that the money paid to him on said note was by him turned over to his father. If the note was the property of Ralph, why did he pay the money therefor to his father? We think that a correct construction of this finding shows that the note was still the property of T. J. Coverdale. If we should con-

strue this finding otherwise, we would then be compelled to say that such finding was not only not supported by the evidence, but was contrary to the only evidence in the case upon the question of ownership of the note, since the only evidence on that point is the statement of Ralph Coverdale, who says his father left the note with him for collection. In that event we would be compelled to reverse the case upon the ground that the controlling finding of fact in the case is not supported by any evidence. (*Mo. Pac. Rly. Co. v. Cassity*, 44 Kas. 207.) We think, however, that the finding of fact, while it is not as full as it should have been upon this point, is consistent with the construction which leaves the ownership of the note at the time of its payment in T. J. Coverdale. It therefore follows that the payment of the same was in fraud of the rights of the plaintiffs to the extent of their claim, and that the second conclusion of law reached by the trial court is erroneous.

We recommend that the judgment of the district court be reversed, and judgment be entered for the plaintiffs for the sum of \$269.29.

By the Court: It is so ordered.

All the Justices concurring.

---

ED. H. MANLOVE *et al.* v. THE COMMERCIAL MUTUAL  
FIRE INSURANCE COMPANY.

1. **INSURANCE COMPANY—Forfeiture of Charter.** The repeal of a statute under which an insurance company is organized, by a subsequent act of the legislature, which declares the charter of such insurance company forfeited unless the company complies with the provisions of the repealing act within a limited time, does not work the cancellation of policies of said company outstanding at the time of the passage of the later act, though the company failed to comply with its provisions and thus forfeited its charter.
2. **POLICY—Cancellation.** The acts of the insurance company, in deciding to close up its business, and notifying the plaintiffs that the

---

Manlove v. Insurance Co.

---

company would not be liable on its policies issued to them, without returning to the plaintiffs the unearned cash premium paid by them to secure said policies, did not operate as a cancellation of said policies.

*Error from Miami District Court.*

THE opinion states the facts. Judgment for the defendant *Company*, at the June term, 1888. The plaintiffs, *Manlove* and another, bring the case here.

*James D. Snoddy*, for plaintiffs in error.

*W. Freeland*, for defendant in error.

Opinion by STRANG, C.: December 13, 1883, the defendant company issued its policy of insurance to the plaintiffs in the sum of \$3,000 upon their frame elevator and machinery therein. November 20, 1884, it issued its policy to the plaintiffs in the sum of \$1,000 additional insurance upon the same property. Each of these policies was to run for the period of five years from date. The plaintiffs paid the defendant, as cash premium, \$47.50 on the first policy, and also gave the defendant their premium note for the sum of \$750; and on the second policy they paid the defendant a cash premium of \$15, and gave their premium note for \$250. On the night of July 7, 1886, the property so insured was entirely destroyed by fire. This action was brought to recover the amount of said policies as the loss suffered thereunder. On the trial of the case the defendant admitted the execution and delivery of the policies sued on; the total destruction of the property insured; that it was of the value of \$8,000; and that the plaintiffs were entitled to a judgment for the amount claimed against the defendant, unless the defendant shows a good defense to the plaintiffs' claim, as follows: The defendant shows that it was organized under and pursuant to the provisions of the act of the legislature approved March 6, 1875; that said act was repealed by the act of March 7, 1885, but that the repealing act gave the defendant and other companies the right to continue business provided they complied with the provisions

---

Opinion of the Court.

---

of the later act by the 1st of December following; otherwise they should forfeit their charters. The defendant company failed to comply with the provisions of the new law, and thus forfeited its charter. Now the defendant claims that the repeal of the act under which it was organized and did business, and its failure to comply with the provisions of the repealing act, operated to cancel all its outstanding policies. We do not think so. The legislature of 1885, in the passage of the bill of March 7 of that year, simply provided that mutual fire insurance companies, like the defendant company, should forfeit their charters and cease to issue policies or do new business unless they complied with the provisions of that act within the time indicated therein. The legislature did not intend nor attempt to cancel any policies of such companies outstanding at the time. Such policies were contracts, in which the holders had an interest that could not be destroyed by legislative action.

For a second defense, the defendant alleges that the directors of the defendant company, at a meeting of the policy-holders, December 1, 1885, of which the plaintiffs had notice, but which they failed to attend, decided to quit business, and appointed W. B. Brayman, attorney of the company, to close up the affairs of the company, directing him to notify policy-holders that the company would not be liable for any loss occurring after December 31, 1885, which notice Mr. Brayman says he sent to the plaintiffs. Counsel for plaintiffs argues in his brief that Brayman's evidence does not show that he sent notice to the plaintiffs. From our view of other matters connected with this alleged defense, it is not very material whether he sent the notice or not; hence we accept the defendant's position that such notice was sent to the plaintiffs as alleged. Having decided to close up the business of the company, the defendant claims that it had a right, under the following provisions contained in each of the policies sued on, to cancel them: "This policy, because of increased risk, or for any other cause, may be canceled, on the company giving notice thereof and returning a ratable proportion of the original cash

premium to the assured for unexpired time." Conceding that defendant gave plaintiffs notice that it had canceled their policies, to take effect on and after December 31, 1885, there is nothing in the record which shows that any of the original cash premium paid by the plaintiffs when they secured their policies was returned to them. The defendant was not authorized by the provision in the policies to cancel them except upon condition that it returned to the plaintiffs the ratable proportion of the original cash premium. Counsel for defendant notices this point in his brief, and says that no complaint was made because a part of the premium was not returned. With the agreement which was made a part of the case on the trial, it was not necessary for the plaintiffs to complain of this. The defendant admitted that the plaintiffs were entitled to judgment against it for their claim unless it showed a good defense. Under this agreement, if the defendant intended to rely upon a cancellation of the policies as matter of defense, it was the duty of the defendant to show that such cancellation was authorized. There is nothing in the record to show that the premium notes given by the plaintiffs, amounting to the sum of \$1,000, were returned to them. We would think these must be returned to the plaintiffs if their policies were to be canceled. If the company by its say so, and notice thereof, cancel all its policies, it could have little or no use for premium notes, and certainly no use for them after the cancellation of the policies took effect, unless in the meantime, before the cancellation of the policies took effect, it should suffer a loss or losses, and then only for the purpose of assessments to pay said loss or losses.

We do not think the defendant's action in relation to the cancellation of the policies sued on in this case operated to cancel said policies, and therefore this defense is not good. We therefore recommend that the judgment of the district court be reversed, and the case remanded for a new trial.

By the Court: It is so ordered.

All the Justices concurring.

## W. S. GROUCH V. F. L. MARTIN.

47	313
57	510
47	313
68	423

**SERVICE by Publication—Affidavit.** Before service can be made by publication, an affidavit must be filed stating that the plaintiff is unable to make service of the summons upon the defendant, and that the case is one of those mentioned in § 72 of the civil code. Without such an affidavit, the attempted service by publication is insufficient.

*Error from Sedgwick Court of Common Pleas.*

THE opinion states the case.

*Hallowell, Hume & Gordon*, for plaintiff in error.

The opinion of the court was delivered by

HORTON, C. J.: On the 10th day of April, 1889, F. L. Martin obtained judgment against W. S. Grouch for \$427, and for a sale of certain lots in Wichita, which had been attached at the commencement of the action. The only service had in the case was by publication. Grouch filed no pleading and made no appearance. Judgment was taken upon default. The affidavit filed for the publication was wholly insufficient. It did not state that the plaintiff was unable to make service of the summons upon the defendant, or that the case was one of those mentioned in § 72 of the civil code. (Civil Code, § 73; *Shields v. Miller*, 9 Kas. 390; *Harris v. Clafin*, 36 id. 543.)

The judgment of the district court must be reversed.

All the Justices concurring.

---

Moody v. Branham.

---

## I. W. MOODY v. B. F. BRANHAM.

**NEW TRIAL — Application.** Where an application by petition is filed for a new trial, under the provisions of § 310 of the civil code, no verification thereof is required.

*Error from Crawford District Court.*

THE case is stated in the opinion.

*E. F. Ware*, for plaintiff in error.

The opinion of the court was delivered by

HORTON, C. J.: On the 14th day of January, 1887, in the district court of Crawford county, B. F. Branham recovered a judgment against I. W. Moody for the sum of \$243.32 and costs. The court adjourned the day that this judgment was rendered. On the 7th day of November, 1887, Moody filed his petition for a new trial, upon the ground of surprise which ordinary prudence could not have guarded against, and also for misconduct of the plaintiff below. A demurrer was filed to the petition, alleging that it did not state facts sufficient to constitute a cause of action. No ruling was made upon the demurrer, but the defendant withdrew the same and on September 14, 1888, with leave of the court, filed a motion to strike the petition from the files, upon the ground that it was not verified as required by law. Thereupon the plaintiff, with leave of the court, filed a new or amended verification. The motion to strike the petition from the files, as amended and verified, was sustained. The plaintiff below excepted and brings the case here.

The petition for the new trial seems to have been filed under § 310 of the civil code. Said section reads as follows:

“Where the grounds for a new trial could not, with reasonable diligence, have been discovered before, but are discovered after the term at which the verdict, report of referee or decision was rendered or made, the application may be made by peti-

tion, filed as in other cases, not later than the second term after discovery; on which a summons shall issue, be returnable and served, or publication made, as prescribed in § 74. The facts stated in the petition shall be considered as denied without answer, and if the service shall be complete in vacation, the case shall be heard and summarily decided at the ensuing term, and if in term, it shall be heard and decided after the expiration of 20 days from such service. The case shall be placed on the trial docket, and the witnesses shall be examined in open court, or their depositions taken as in other cases; but no such petition shall be filed more than one year after the final judgment was rendered."

The causes for a new trial alleged in the petition were among those stated in § 306 of the civil code. No verification is required to a petition filed under the provisions of said § 310, and therefore the failure to verify the petition for a new trial was not sufficient ground to strike it from the files.

No brief has been filed upon the part of plaintiff below, and we have before us for consideration only the record filed and the brief of plaintiff in error.

The order and judgment of the district court will be reversed, and the cause remanded.

All the Justices concurring.

## THE ATCHISON, TOPEKA & SANTA FÉ RAILROAD COMPANY V. JACOB SCHROEDER.

### 1. MASTER AND SERVANT — *Dangerous Employment — Assumption of Risk.*

While it is the duty of an employer, whether a railroad company or other corporation or person, to make the work of his or its employes as safe as is reasonably practicable, yet when the employé, with full knowledge of all the dangers incident to or connected with the employment as it is conducted, accepts the employment, or, having accepted the same, continues in it with such full knowledge, and without any promise on the part of the employer, or any reason to expect on

47	315
49	626
47	315
53	7
53	741
47	315
67	818
47	315
68	323
68	650
68	832
47	315
69	728
47	315
76	73
76	111
77	147
77	647
47	315
79	594



---

A. T. & S. F. Rld. Co. v. Schroeder.

---

the part of the employé, that the employment will be made less dangerous, the employé assumes all the risks and hazards of the employment.

2. ——— Other matters referred to in the opinion.

*Error from Butler District Court.*

THIS was an action brought in the district court of Butler county, on February 24, 1887, by *Jacob Schroeder* against the *Atchison, Topeka & Santa Fé Railroad Company*, to recover damages to the amount of \$5,000, for alleged personal injuries. On March 7, 1888, the plaintiff amended his petition, setting forth his cause or causes of action in two counts, the first of which reads as follows:

"The plaintiff, for his cause of action against the defendant, says, that he has been in the employ of various railroad companies for 16 years last past, and that for the last 10 years he had been in the employ of the defendant, the *Atchison, Topeka & Santa Fé Railroad Company*, in the capacity of section foreman, and that he has during all that time honestly and faithfully performed every duty required of him as such foreman; that he has given to said defendant his entire time, attention, and services, and has at all times obeyed and complied with all the requests and orders emanating from those in authority over him, and says that in the regular discharge of his duty as such foreman in charge of section No. 4CX, on the *Florence, El Dorado & Walnut Valley railroad*, owned and operated by the defendant, that the defendant furnished the plaintiff with only one man to assist him in keeping said section No. 4CX in order and in good repair, and that he so employed as such foreman and with said help was ordered, by the agents and employés of the defendant railroad company in authority over him, to replace certain rails on said track of said company's railroad, and which said rails it was necessary to replace for the safety of the passengers on the said line of road, and for the cars running thereon; and that said rails were of the weight of 560 pounds each, which rails the defendant required this plaintiff, as such foreman, with the aid of only one man, to load on hand-cars, take to the place where wanted, and place upon the ties of said line of railroad.

"And the plaintiff alleges and avers the fact to be that the labor required of him by the defendant was unusual and extra

---

Statement of the Case.

---

hazardous, and exposed the plaintiff to unusual and extra hazardous risks to life and limb and of injury to his health and strength; and that the defendant knew that said labor was unusual and extra hazardous, and demanded the plaintiff to perform such labor and to handle such rails knowing said labor was unusual and extra hazardous, and then and there informed the plaintiff that unless he handled such rails and performed such services that he would be discharged from the services of the company and from the position of foreman, and a man put in his place who would handle such rails of the weight of 560 pounds, with the help as above stated.

"The plaintiff alleges that he objected to performing the work so required, and notified the defendant of his objections, and that the defendant stated to the plaintiff that he could take his choice, to perform the labor or throw up his job as foreman on said section; and that the plaintiff, after two or three times notifying the railroad company of the great risk there was in attempting to handle such rails, at the special instance and request of the defendant undertook said work and labor, cautiously and prudently guarding against accident and unnecessary exposure, notwithstanding, however, after the plaintiff had used all the caution that it was possible for him to use in handling said rails, and placing them upon the ties, as required by the defendant, in the regular discharge of his duty as such foreman, without any fault or negligence on his part whatever, the plaintiff received a severe injury, which injury will incapacitate him from the kind of work which he has heretofore been able to perform, or any other manual labor requiring great strength and endurance, which he had before that time possessed; which injury consisted of a rupture in the right side, which was caused by the handling of said rails for the defendant as above stated, and which injury greatly prostrated the plaintiff, and rendered him incapable of performing any manual labor whatever for some time thereafter; and that ever since said injury he has been compelled to wear a truss, and that he cannot and dare not exercise himself violently or to his full capacity or strength; and that, by reason of said injury he has been made a cripple, and is physically injured for life, to his great damage in the sum of \$5,000.

"The plaintiff further alleges, that immediately after being injured he reported the fact to the defendant, and that said defendant has failed and refused to compensate him for said damage. The plaintiff further alleges, that having been in-

jured in the manner and form above specified, and incapacitated from hard work, that he applied to A. A. Robinson, the agent and employé of the defendant, high in authority, for a position in the employ of the defendant with less exposure, less risk and not requiring so much physical ability, tendering and offering to the defendant his time and services to the full extent of his strength remaining since said injury, but that the defendant has failed, neglected and refused to furnish the plaintiff with any other or lighter employment, but on the contrary has lately notified the plaintiff that they no longer desired his services, and have dismissed and discharged the plaintiff, against his wish and desire."

The defendant demurred to this petition upon the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled; and the defendant then answered, setting forth—first, a general denial; second, that the injuries complained of were caused by the plaintiff's own negligence; third, the two years' statute of limitations. A trial was had before the court and a jury, and at the beginning of the trial the defendant objected to the introduction of any evidence, upon the ground that the petition did not state facts sufficient to constitute a cause of action. This objection was overruled as to the first count, and sustained as to the second count, and the trial then proceeded upon the first count only. After the evidence was all introduced, the court gave to the jury the following among other instructions, to wit:

"You are instructed that a railroad company is bound to use reasonable precautions for the safety of its employés, and this extends to the furnishing sufficient force for the performance of any duty only ordinarily hazardous when performed by a sufficient force, but which would be extraordinarily hazardous when undertaken by an insufficient force; but in such case if the employé undertook such duty without objection, knowing it to be extra hazardous, he would not be entitled to recover for any injury received in the performance of such duty; but, on the other hand, if he made his objections to his performance of such duty known, but was notwithstanding directed or ordered to undertake the same and received an injury therefrom, he would be entitled to recover."

The court also refused to give to the jury various instruc-

---

Opinion of the Court.

---

tions asked for by the defendant. At the close of the trial the jury found a general verdict in favor of the plaintiff and against the defendant, and assessed the plaintiff's damages at \$3,000; and the jury also made a number of special findings. The defendant then moved to set aside the general verdict and for judgment in its favor, which motion was overruled, and then the defendant filed and presented a motion for a new trial upon various grounds, which motion was also overruled; and the court then rendered judgment in favor of the plaintiff and against the defendant for the amount of damages found by the jury, and for costs; and the defendant, as plaintiff in error, brings the case to this court for review.

*Geo. R. Peck, A. A. Hurd, and Robert Dunlap*, for plaintiff in error.

*E. N. Smith, Aikman & Brooks, and J. B. Larimer*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This present action was commenced by Jacob Schroeder against the Atchison, Topeka & Santa Fé Railroad Company for \$5,000 as damages for personal injuries. It was tried in the court below upon the first count of the plaintiff's amended petition and the defendant's answer, and judgment was rendered in favor of the plaintiff and against the defendant for \$3,000 and costs, and the defendant, as plaintiff in error, now complains. The evidence of the plaintiff below fairly tended to prove the allegations of that part of his amended petition upon which his case was tried, and we have nothing to do with the other part of his petition, to wit, the second count. Much of the plaintiff's evidence, however, was contradicted by the evidence of the defendant. The plaintiff's evidence showed that he was the section foreman of section 4CX of the "El Dorado branch" of the defendant's railroad; that George J. Lockie was the roadmaster under whom he worked and received his orders; that John Faust was a section-hand working under the plaintiff and subject to his orders. The

injury of which the plaintiff complains occurred on February 17, 1886, substantially as follows: The plaintiff and Faust were unloading five railroad rails from what the witnesses call a "push car," and while unloading the last rail, the plaintiff holding one end and Faust the other, Faust threw, or in some manner let fall, his end while the plaintiff was holding his, and the plaintiff's end struck him in the lower part of his abdomen and produced a rupture; and this is the injury of which he complains. The plaintiff testified that the handling of these rails was a part of his duties as section foreman; that he was required by the roadmaster, George J. Lockie, to perform all his duties as section foreman with only one assistant, to wit, John Faust; that one assistant only was not sufficient; and that the handling of these rails in the manner in which he was required to handle them was dangerous and hazardous. The roadmaster, however, George J. Lockie, who at the time of the trial resided in California, and whose deposition was read in evidence on the trial, testified among other things as follows:

"While thus employed as such roadmaster I was acquainted with the plaintiff, Jacob Schroeder, who was a section-foreman under my orders, and in charge of section No. 4CX of said road, that being the first section north of the city of El Dorado. I never either ordered or requested Mr. Schroeder to change rails or to replace rails of said road with the help of only one man, but on the contrary, whenever there was work of that kind to be done by him I sent him whatever assistance he required. During the years that I have mentioned, that is while I was in charge of the "El Dorado branch" as roadmaster, it was customary for us to reduce the section force during the fall and winter months, and at times Mr. Schroeder only had one man regularly with him on his section, but, as I have already stated, whenever it became necessary from any cause to remove or replace rails, he was furnished with sufficient help, either by hiring an additional force for the time being, or by sending him men from some of the other sections of the road to aid him in making such changes of rails as might be necessary. In fact, Mr. Schroeder and all the other section foremen of that branch had general standing orders and authority from me to call upon each other for assistance whenever such assistance was in their judgment necessary, for

---

Opinion of the Court.

---

the purpose of changing or replacing rails, or doing any other work that rendered necessary or proper more force than such foreman might have under his immediate charge and direction at the time."

For the purposes of this case we shall take the evidence of the plaintiff as true; and under such evidence and the allegations of the plaintiff's petition, can he recover in this action? We would think not. The only allegation of negligence against the railroad company was that it failed and refused, notwithstanding the solicitations and protests of the plaintiff, to furnish him with sufficient help to perform his duties as section foreman. It is admitted and was shown that the plaintiff was an experienced railroad man, had worked at this same kind of business for many years, and knew all the risks and hazards of the business as well perhaps as any man could know the same. He was not employed for any particular length of time, and could have quit the defendant's employment at any time without violating any contract, or without leaving any contract of his own unfulfilled; and, if his own evidence is true, the company did not agree to furnish him with any additional help, but, on the contrary, utterly refused; and he had no reason to expect or to hope for any additional help. If the evidence of the defendant is true, however, he could have had additional help whenever it was necessary by simply asking for it. We shall consider this case, however, upon the theory of the plaintiff, and that is, that he desired additional help; that additional help was necessary; that he asked for it; that the railroad company, through its roadmaster, refused to give him any, and threatened to discharge him if he could not perform his duties without additional help; and that the injury occurred because of a want of sufficient help. This is substantially what the plaintiff alleged in his petition, and what his testimony showed on the trial. His testimony shows that the order from the roadmaster to reduce his force to one man only besides himself was received by him on November 30, 1885, and his injury did not occur until February 17, 1886. It was therefore not an order to perform

---

A. T. & S. F. Rld. Co. v. Schroeder.

---

some duty on such short notice that he did not have a sufficient time for reflection or consideration before he encountered the danger. He protested against the order, according to his own testimony, but it was not revoked or modified, and he had no reason to believe or to hope that it would be revoked or modified. We think the principles discussed and decided in the case of *Rush v. Mo. Pac. Rly. Co.*, 36 Kas. 129, *et seq.*, are controlling in the present case. In that case an elaborate opinion was delivered, which see. In the case of *Leary v. B. & A. Rld. Co.*, 139 Mass. 580, the following is decided:

"If a servant, of full age and ordinary intelligence, upon being required by his master to perform other duties more dangerous and complicated than those embraced in his original hiring, undertakes the same, knowing their dangerous character, although unwillingly and from fear of losing his employment, and is injured by reason of his ignorance and inexperience, he cannot maintain an action against the master for such injury." (Syllabus.)

In the case of *G. H. & S. A. Rly. Co. v. Drew*, 59 Tex. 10, the following is decided:

"The master is not liable in damages for an injury to his employé which results from the use of defective machinery, if the employé has full notice of the defect and of danger which will attend continuing the employment. The simple protest by the employé against the use of the machinery, when directed to use it, will not vary the rule, if, when having knowledge of the risk, he obeys the order." (Syllabus.)

In the case of *M. R. & L. E. Rld. Co. v. Barber*, 5 Ohio St. 542, the following is decided:

"It is the duty of a railway company to furnish the necessary and proper number of hands for the safe management of its trains; and for a delinquency in this particular the conductor of a train has a right to decline his charge, or refuse to run the train. But where he takes the charge, and runs his train for a length of time without a sufficient number of hands, he voluntarily assumes the risk, and waives the obligation of the company in this respect as to himself, and if injured by means of such delinquency on the part of the company, he is

## Opinion of the Court.

without a remedy against the company for damages." (Syllabus.)

Also, in the case of *Woodley v. M. D. Rly. Co.*, 2 Exch. Div. L. R. 384, 389, the language of Chief Justice Cockburn is strong and to the point. Among other things he says:

"If a man chooses to accept the employment or to continue in it with a knowledge of the danger, he must abide the consequences so far as any claim to compensation against the employer is concerned."

In the case of *Wormell v. M. C. Rld. Co.*, 79 Me. 397, 405, (same case, 10 Atl. Rep., 49, 51, 52,) the following language is used:

"Every employer has the right to judge for himself in what manner he will carry on his business, as between himself and those whom he employs, and the servant having knowledge of the circumstances must judge for himself whether he will enter his service, or, having entered, whether he will remain. . . . But there are corresponding duties on the part of the servant; and it is held that the master is not liable to a servant who is capable of contracting for himself, and knows the danger attending the business in the manner in which it is conducted, for an injury resulting therefrom."

See, also, the cases cited in this last-cited case, and also the following cases: *Crutchfield v. R. & D. Rld. Co.*, 78 N. C. 300; *Stephenson v. Duncan*, 73 Wis. 404; same case, 41 N. W. Rep. 337; *Smith v. W. & St. P. Rld. Co.*, 42 Minn. 87; same case, 41 Am. & Eng. Rld. Cases, 289; *McGlynn v. Brodie*, 31 Cal. 376.

After a careful consideration of all the cases, we must say that, while in our opinion it is the duty of an employer, whether a railroad company or other corporation or person, to make the work of his or its employ  s as safe as it is reasonably practicable, yet when the employ  , with full knowledge of all the dangers incident to or connected with the employment as it is conducted, accepts the employment, or, having accepted the same, continues in it with such full knowledge, and without any promise on the part of the employer, or any reason to expect on the part

Master and servant—dangerous employment—assumption of risk.



*Myers v. Center.*

of the employé, that the employment will be made less dangerous, the employé assumes all the risks and hazards of the employment.

It is also claimed by the plaintiff in error that the court below erred both in the admission of evidence and in the exclusion of evidence; but with the views which we entertain concerning the matters already discussed, we think it is unnecessary to consider these other alleged errors.

The judgment of the court below will be reversed, and the cause remanded for further proceedings.

All the Justices concurring.

---

JOHN N. MYERS *et al.* v. CYNTHIA CENTER.

47	324
64	700
47	324
69	470

1. **FRAUD — Concealment — Limitation of Action.** The statute of limitations does not begin to run against an action for relief on the ground of fraud until the fraud is discovered by the party aggrieved. But where this exception is relied on, and the plaintiff's petition shows that the fraud was consummated more than two years before the commencement of the action, it is incumbent on him to allege that he did not discover the fraud until within the two-year period of limitation, in order to take it out of the operation of the statute. An allegation that he did not find the whereabouts of the defendant is not equivalent to an averment of a failure to discover the fraud.
2. ——— "Absconding and concealing," as used in §21 of the civil code, refers to the acts of the party within this state. (*Hoggett v. Emerson*, 8 Kas. 262; *Frey v. Aultman*, 30 id. 181.)

*Error from Sedgwick District Court.*

THE opinion states the facts. Judgment for defendant, *Center*, on March 21, 1889. The plaintiff *Myers* and seven others bring the case here.

*C. H. Chitty*, and *Sankey, Campbell & Amidon*, for plaintiffs in error.

*Stanley & Hume*, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J.: The plaintiffs, who are alleged to be the sole heirs at law of Francis Myers, deceased, who died intestate in April, 1869, brought this action in the district court of Sedgwick county against the defendant, Cynthia Center, who was formerly the wife of Francis Myers, deceased, asking for relief on account of the fraud of the defendant. The petition was in two counts, in which it was substantially alleged that Francis Myers and the defendant were married to each other in Indiana in 1852, and lived together as husband and wife until the fall of 1859; that in 1858 or 1859 Francis Myers sold his farm and other property and with the defendant moved to Iowa; that in the fall of 1859 Francis Myers was taken sick, and while he was confined to his bed his wife secretly absconded, taking with her a team and wagon of the value of \$400, and \$1,600 in money, the property and money of her husband; that she "fled from the state of Iowa, and soon thereafter changed her name, and removed from place to place, so that the said Francis, during his life-time, although making diligent search therefor, was unable to learn where she had gone, or her place of residence; that said Francis Myers died in April, 1869, without having heard from defendant, or knowing where she had gone; that plaintiffs, after the death of said Francis Myers, were unable to learn of the whereabouts of the defendant until within the past two years." It is alleged that the defendant has invested the money so obtained from time to time in real property situated in Sedgwick county, Kansas, and that such property in fact belongs to the plaintiffs, who are the sole heirs of Francis Myers, who died intestate in Iowa, leaving no debts. In one count the plaintiffs ask that defendant be declared to hold the property in trust for them, and to account for the rents and profits of the same, and that she be required to convey the property to the plaintiffs. In the other count they ask for judgment against her for the sum of \$2,000, with 7 per cent. annual interest thereon from October, 1859. The defendant demurred to the

---

Myers v. Center.

---

petition, upon the grounds that the action was barred by the statute of limitations; that it did not state facts sufficient to constitute a cause of action; and that the plaintiffs are not the proper parties to sue, nor the real parties in interest. The demurrer was sustained by the court, and the plaintiffs electing stand to upon their petition, judgment was rendered against them for costs.

The ruling on the demurrer was correct. The causes of action which the plaintiffs attempted to state are manifestly based on the fraud of the defendant, and, if they ever existed, are barred by the statute of limitations. Such an action can only be brought within two years after the cause of action shall have accrued. (Civil Code, § 18, subdiv. 3; *Young v. Whittenhall*, 15 Kas. 579; *Main v. Payne*, 17 id. 608; *Doyle v. Doyle*, 33 id. 721.) The averments of the petition disclose that the fraud was consummated over 30 years ago, but the plaintiffs rely upon the exception that the cause of action does not accrue until the discovery of the fraud. As it was apparent upon the face of the petition that the fraud was consummated and that the cause of action was complete in 1859, it devolved upon the plaintiffs to plead this or any other exception which would take the case out of the operation of the statute of limitations. (*Young v. Whittenhall*, supra.) The averments of the petition show not only the commission of the fraud, but that it was discovered soon afterward by Francis Myers, in his lifetime, as it is alleged that he made diligent search to find her, but that he died in 1869 without finding her or the property which she carried away. It is the failure to discover the fraud, and not the inability to find the person who has committed the fraud, which gives rise to the exception that has been mentioned.

The plaintiffs also claim that the allegation that the defendant absconded and concealed herself brings the case within the exception provided in § 21 of the civil code. It is not enough to establish an exception that the defendant absconded from Iowa, or concealed herself elsewhere than in Kansas. "The words absconding and concealing as used in that section refer

---

Opinion of the Court.

---

to the acts of the party in this state." (*Frey v. Aultman*, 30 Kas. 182; *Hoggett v. Emerson*, 8 id. 262.) It is not stated in the petition when the defendant came to Kansas, nor are there any averments of acts or efforts on her part to conceal her whereabouts since she came to Kansas. It is stated that she left the state of Iowa, changed her name, and removed from place to place, so that Francis Myers during his lifetime was unable to learn where she had gone, or her place of residence; but even these allegations, although insufficient to create an exception, do not apply to the plaintiffs. Francis Myers died in 1869, and there is no allegation that the defendant changed her name or place of residence since 1869. The mere general allegation that plaintiffs were unable to learn the whereabouts of the defendant until two years prior to the commencement of the action is of itself insufficient to bring it within the exception mentioned in § 21. If the concealment is such as is contemplated by that section, it devolved on the plaintiffs to clearly set forth the acts constituting the same, and, failing to state this, or any other exception, the petition was fatally defective, and the demurrer was rightly sustained. As this ground alone is sufficient to sustain the ruling of the court, it is unnecessary to examine the others.

The judgment of the district court will be affirmed.

All the Justices concurring.

47	328
65	47

47	328
75	213

NORA PHIPPS V. WILLIAM PHIPPS *et al.*

1. **TENANCY IN COMMON—*Rights inter se.*** Where a husband and wife have an interest in common with other heirs in real estate, and are in the possession and enjoyment of the premises under an agreement to pay the taxes and "keep the place up," and the husband takes an assignment from the county of a tax certificate of sale, this operates as a payment of the delinquent taxes; and an assignee of the tax-sale certificate from the husband takes no greater or higher rights than the husband had, although such assignee furnished the money to the husband with which to purchase said certificate; and in an action for partition between the heirs, where all questions of title are settled in favor of the heirs, the assignee of the tax-sale certificate is not entitled to interest on the amount paid for a tax deed from the date of payment until the day of trial, but is only entitled to interest at the legal rate on the money advanced, subject to a reduction for the annual rental value of that part of the premises of which the assignee was in possession.
2. **TAX-SALE CERTIFICATES—*Evidence.*** Under the peculiar circumstances of this case, the tax-sale certificate in the hands of the original purchaser, or of his assignee, cannot be used against the heirs for any other purpose than as evidence of the amount of delinquent taxes paid by either of them on the land.
3. **IMPROVEMENTS—*Value—Recovery.*** The assignee of the tax-sale certificate in this case can only recover for the value of such improvements as permanently enhanced the value of the land.

*Error from Bourbon District Court.*

ACTION for the partition of certain land. The case is fully stated in the opinion.

*J. D. McCleverty*, for plaintiff in error.

*Hulett & Fletcher*, for defendant in error Wm. H. Van Buskirk.

Opinion by SIMPSON, C.: This is the second time that this plaintiff in error has brought this case to this court for review. For a statement of most of the material facts, see 39 Kas. 495. The action is one for partition of the east half of section No. 36, township 23, range 23, in Bourbon county. This court

---

Opinion of the Court.

---

held when the case was here before that Daniel Van Buskirk and William H. Van Buskirk held the title to the southeast quarter in trust only, so far as William and Nora Phipps are concerned, and this court ordered that an accounting must be had and the property partitioned as the interests of the heirs of David M. Phipps should appear, and reversed the cause and remanded it to the district court for another trial. At the September term, 1888, the second trial was had, and the court made these special findings:

"1. The said plaintiff, Nora Phipps, and the defendants, William Phipps and Lilly Van Buskirk, as heirs-at-law of David M. Phipps, and the grantees of his widow, their mother, are the owners in fee-simple, subject to the claims of William H. Van Buskirk, as hereinafter mentioned, of all that tract or parcel of land situated in Bourbon county, state of Kansas, and described as follows, to wit: The east half of section No. 36, in township No. 23 south, of range No. 23. Each of said parties owns an equal undivided one-third share and interest in said real estate, and they are entitled to have partition thereof made.

"2. In the fall of 1877 the said Daniel Van Buskirk married the said Lilly, one of said heirs, and immediately after his marriage the said Daniel and Lilly Van Buskirk made an agreement with Margaret Zuck, the mother and natural guardian of said heirs, who, since the death of David M. Phipps, had married one Peter Zuck, by the terms of which agreement said Daniel and Lilly Van Buskirk were to pay all taxes due and to become due upon said land; also to pay all other claims against said land, including two annual payments due the state upon a school-land purchase upon said southeast quarter-section, with accruing interest; the other heirs, the said Nora and William Phipps, then minors, to live with them on said land. Pursuant thereto, said Daniel and Lilly Van Buskirk at once went into the use and possession of said east half-section, and the said Nora and William Phipps lived with them in the home place of the Phipps family, on the south half of said southeast quarter; said Margaret Zuck also turned over to Daniel and Lilly Van Buskirk the crop raised upon said land for the year 1877, and some live stock, the property of David M. Phipps's estate, upon which estate there had been no administration, to aid in paying any claims against

---

Phipps v. Phipps.

---

said land. At that time the title of said southeast quarter-section was a school-land purchase certificate, upon which two payments were yet to be made.

"3. In November, 1878, the taxes were delinquent upon said southeast quarter-section for the year 1875 and subsequent years, and there was also an installment of interest due on the school-land certificate. Daniel Van Buskirk, whose duty it was to pay these taxes and this interest, was unable to do so, and in order to save a portion of said land to the heirs of David M. Phipps, procured W. H. Van Buskirk to pay the same, with the understanding and agreement that as soon as W. H. Van Buskirk obtained title from the state, he would convey to the heirs of David M. Phipps the north half of said quarter-section and retain the south half for himself. At the time of this agreement W. H. Van Buskirk was informed by the county treasurer, and was under the impression, that the land was forfeited by reason of the failure to pay the taxes and installment of interest. The amount so paid by W. H. Van Buskirk in pursuance to such agreement was: On November 22, 1878, for taxes, \$89.94; for interest on school-land certificate, \$10.60; on October 10, 1879, balance due state, principal and interest on school-land certificate, \$114.60, at which time W. H. Van Buskirk obtained title to said quarter-section from the state, and thereupon caused the north half of said quarter to be conveyed to Daniel Van Buskirk, husband of Lilly Van Buskirk, while Lilly Van Buskirk with Daniel Van Buskirk, her husband, conveyed to William and Nora Phipps all of Lilly Van Buskirk's interest in the northeast quarter of said section 36, as the heirs of David M. Phipps. The said Nora and William Phipps declined to accept the benefit of the said conveyance from Lilly and Daniel Van Buskirk for said northeast quarter-section, and on trial consented that a decree might go revesting such title in said Lilly Van Buskirk.

"4. On November 22, 1878, when W. H. Van Buskirk paid the taxes and interest aforesaid, he was living in Missouri, and it was mutually agreed between him, Daniel Van Buskirk, and the county treasurer, that, for the convenience of the parties, the tax certificate should be taken out in the name of Daniel Van Buskirk, which was accordingly done, although Daniel Van Buskirk did not at any time have any interest in said certificate, except to hold the same for the benefit of W. H. Van Buskirk; and the assignment of said tax certificate

## Opinion of the Court.

by Daniel to William H., on October 16, 1879, was for the purpose of putting it in the original and actual owner, so that he might thereby complete the payment of the purchase-price and procure a patent from the state.

"4½. Immediately upon getting the patent for the land and making the conveyances mentioned, Daniel Van Buskirk built a house and moved upon the north half of said quarter, with William and Nora Phipps, who lived with him until about three years before bringing this suit. Daniel Van Buskirk has had exclusive possession of said north half of the quarter ever since he moved upon it, and has made lasting and valuable improvements thereon. W. H. Van Buskirk has had exclusive possession of the south half of said quarter from the time he obtained the patent.

"5. The said Wm. H. Van Buskirk has made lasting and valuable improvements upon said south half of said southeast quarter-section, of the value of \$1,050, and is entitled to the amount paid on said south half of said quarter-section on said tax deed, and for subsequent taxes, with 20 per cent. interest thereon from date of payment, in amounts as follows:

To paid for tax deed October 16, 1879.....	\$94 65
Interest thereon to date at 20 per cent.....	168 62
Tax paid December 16, 1879.....	6 73
Interest thereon to date at 20 per cent.....	11 88
Tax paid November 20, 1880.....	3 50
Interest thereon at 20 per cent. to date.....	5 56
Tax paid June 18, 1881.....	3 50
Interest thereon at 20 per cent. to date.....	5 13
Tax paid December 20, 1881.....	4 73
Interest thereon at 20 per cent. to date.....	6 39
Taxes paid December 12, 1882.....	9 33
Interest thereon at 20 per cent. to date.....	10 90
Taxes paid December 19, 1883.....	8 11
Interest thereon at 20 per cent. to date.....	7 83
Taxes paid November 8, 1884.....	12 02
Interest thereon at 20 per cent. to date.....	9 40
Taxes paid November 16, 1885.....	8 74
Interest thereon at 20 per cent. to date.....	5 04

Total tax redemption..... \$376 88

Said Wm. H. Van Buskirk paid, October 16, 1879, the balance due on said school-land purchase, principal \$104, and interest from November 22, 1878, at 10 per cent., total \$114.60. The amounts due said Wm. H. Van Buskirk are as follows, to wit:

Value of improvements, as above.....	\$1,050 00
Tax redemption, as above.....	376 88
Paid on school certificate and interest.....	114 60
Interest on same at 7 per cent. to date.....	72 19
	<hr/>
	\$1,513 62



## Phipps v. Phipps.

"6. There is due and chargeable, as the rents and profits of said south half of said southeast quarter-section from the year 1878 to date, in the sum of \$650.62, to be deducted from the amount due said Wm. H. Van Buskirk, being the total deduction to be made therefrom, and leaving a balance due him of \$963.

"7. Said Wm. H. and Daniel Van Buskirk hold in trust the title to said southeast quarter-section for the use and benefit of said Nora Phipps, Wm. Phipps and Lilly Van Buskirk.

"8. Said tax deed is void, and said heirs are entitled to the possession of said south half of said southeast quarter-section, (subject to a lien in favor of said Wm. H. Van Buskirk for the said sum of \$963;) and the said Nora and William Phipps are each entitled to be let into the possession of an equal undivided one-third interest in and to the north half of said quarter-section. It is therefore by the court now here considered, ordered and adjudged and decreed, that the said Nora Phipps, William Phipps and Lilly Van Buskirk have and recover of and from the said Wm. H. Van Buskirk the possession of the said south half of the southeast quarter of section No. 36, in township No. 23 south, of range No. 23 east; that he, the said Wm. H. Van Buskirk, execute and deliver to them a proper deed of conveyance therefor of all of his right, title and interest therein, executed by himself and his wife; and that in default thereof this judgment shall operate as such conveyance, subject, however, to a specific lien thereon, which is hereby given the said Wm. H. Van Buskirk for the said sum of \$963, and process is awarded to carry this judgment and decree into effect. It is further ordered, that if said sum of \$963 is not paid on or before March 1, 1889, an order of sale may issue. It is further considered, ordered and adjudged and decreed, that the said Nora Phipps, William Phipps and Lilly Van Buskirk have and recover as against the said Daniel Van Buskirk like relief as set forth in the above and foregoing judgment and decree against Wm. H. Van Buskirk, as to the north half of said southeast quarter-section; and it is ordered that all questions as to any claims in favor of said Daniel Van Buskirk for improvements made and taxes paid upon said north half of said quarter-section, as also all claims for rents thereof from November, 1877, to this time, in favor of said heirs, shall be left open for consideration upon the incoming of the report of the commissioners hereinafter appointed to make partition of said real estate. It is further considered,

---

Opinion of the Court.

---

ordered, adjudged, and decreed, that partition be and is hereby granted of all that tract or parcel of real estate mentioned in plaintiff's petition, situated in Bourbon county, state of Kansas, and described as follows, to wit: The east half of section 36, in township No. 23 south, of range No. 23 east, subject to the lien and claim above mentioned, so that there shall be set off in severalty an equal one-third in value to each of the said Nora Phipps, William Phipps, and Lilly Van Buskirk; and in order to make such partition, Geo. W. Armstrong, J. N. Post and Clifford Latta are hereby appointed commissioners for that purpose, and if said partition of said half-section can be made without manifest injury, said commissioners will lay off said several interests by metes and bounds; but if not, then they shall make a valuation and appraisal thereof, and return their doings under this order to this court. It is further ordered and adjudged, that said Wm. H. Van Buskirk pay the costs and fees due his own witnesses herein, and one-half of the court costs, also that the other parties hereto pay the costs and fees due their witnesses and one-half the court costs, to be charged and adjusted upon the incoming of the report of said commissioners."

From these findings and the judgment based upon them, there is no longer any question of title, as full title is now vested in all of the Phipps heirs. William and Nora Phipps having refused to accept the benefit of the deed for their interest made by Daniel Van Buskirk and wife to them for the north quarter-section, each of the heirs of David M. Phipps, to wit, Lilly Van Buskirk, Wm. Phipps, and Nora Phipps, is entitled to one-third of the half-section, subject to whatever rights accrued to Wm. H. Van Buskirk by reason of the facts hereafter to be recited. So that the only question here is, what are the rights of Wm. H. Van Buskirk under the second, third, fourth, fifth, sixth, seventh and eighth findings? The fourth finding states that the tax certificate was taken out in the name of Daniel Van Buskirk, by agreement, for the convenience of parties, because Wm. H. Van Buskirk lived in Missouri, but that Daniel did not have any interest in the same except to hold it for the benefit of William, and that the assignment of the certificate from Daniel to William was for the purpose of putting it in the original and actual owner,

---

Phipps v. Phipps.

---

so that he could complete the payment of the purchase-price, and procure a patent from the state. Upon the theory of this finding, the court then proceeds in the fifth finding to state an account between Wm. H. Van Buskirk and the Phipps heirs, and in this statement of account committed several grave errors, greatly to the prejudice of the heirs. The most flagrant of these is, that Wm. H. Van Buskirk is allowed interest on the amount paid for the tax deed from its date until the date of the findings at the rate of 20 per cent. per annum. Waiving any discussion at present as to whether he is entitled to any interest but that for money advanced, which would bear but the legal rate, it is evident that, being in possession of the premises, and enjoying the rents and profits thereof, these must be devoted as they annually accrue to the payment of the accruing taxes, and, if there be a surplus, to the annual reduction of the original cost of the tax deed. In other words, it would be gross injustice to allow William 20 per cent. on the cost of the tax deed from its date, and 20 per cent. on the annual payment of taxes from the date of their payment up to the time of trial, when he was annually receiving from the proceeds of the farm sums that at the time of the trial aggregated \$650.62, and when no interest is allowed on these rents and profits so annually received. The rents and profits must be applied annually to the reduction of the amount paid for the tax deed, and accruing annual taxes. It may be said, as a matter of strict law, that William H. Van Buskirk could take no greater rights by virtue of the tax certificate of sale than his assignor, Daniel Van Buskirk, acquired by the purchase of the certificate. It is difficult to see, under this state of facts, how Daniel Van Buskirk or his assignee, William, can use this certificate for any legal purpose, except evidence of payment; so that, whatever claim William may have by reason of having furnished the money with which Daniel made the purchase, and thus by operation of law paid the delinquent taxes, arises from equitable considerations, and not from the face or terms of the tax certificate of sale and its statutory attributes. Under the circumstances of this case,

we do not think that it is either legal or equitable to allow 20 per cent. interest on the amount of money William furnished Daniel with which to purchase the tax-sale certificate, or to allow that rate of interest on the subsequent taxes paid.

Again, it is only such improvements as enhance the value of the property that can be taken into account under all the facts and circumstances of this case. All absolutely necessary improvements, that contribute to the comfort and convenience of the party in possession, and all those necessary to protect his stock and preserve his crop, such as the repair of the dwelling-house, the repair of fences, the cleaning out of the spring that furnishes them water, and all acts of a similar character pertaining to the present use and enjoyment, and contributing to the comfort and profit of the occupant, are not such lasting and valuable improvements as enhance the value of the property and become the subject of equitable recognition and protection. The accounting between these parties ought to be done on this basis and guided by these rules: There should be deducted from the amount of money furnished by William H. Van Buskirk and paid on school certificate and interest, and for tax deed and for taxes of 1879, the annual rental value of the premises he occupied from the date of his occupancy to the end of the first year. This would bring a credit on the money furnished on or about the 1st day of December, 1880, the sums advanced by William bearing interest at 7 per cent. to that date. This balance would then bear interest until the next annual rent became the subject of deduction. The annual rental, as it accrued, should first be devoted to the payment of the taxes accruing annually on the land, and if the rent is in excess of the taxes, the excess should be credited on the original amount paid for school certificate, tax deed, and interest, the annual balance thus created bearing interest at 7 per cent. per annum. To any balance remaining at the expiration of William's occupancy should be added the value of such lasting and valuable improvements as he may have made in good faith while in the actual occupancy of the premises that have enhanced the value of the property. It

---

Phipps v. Phipps.

---

seems to us, on the state of facts presented in this record, and its peculiar circumstances, that this mode of accounting is as fair and equitable as anyone that can be adopted. That the court has power to adjust on an equitable basis, is clear from § 629 of the code, which gives the court full and ample power to settle all such questions in actions of this character on just and equitable principles. This is the view taken of the power of the court in *Sarbach v. Newell*, 28 Kas. 642, and that case is express authority to require the application of the rents and profits to the taxes as they annually accrue. Every case makes its own law; and the facts and attending circumstances of this one call for the fullest exercise of those equitable powers conferred upon the court by § 629 of the code in actions of this character. We regard the declaration of the court when this case was here before, "that William H. Van Buskirk cannot claim any higher or greater rights in the tax-sale certificate," as a correct exposition of the law governing that particular transaction, because the moment that certificate was assigned by the proper county officer to Daniel, the law operated, and it became a payment of the delinquent taxes, and this operation of a well-settled principle cannot be varied to suit the necessities of any of the parties to a lawsuit. These are some of the reasons that induce us to recommend to the court that the judgment be reversed and a new trial ordered.

By the Court: It is so ordered.

All the Justices concurring.

W. A. ALLEN *et al.* v. F. P. GARDNER.

1. **REPLEVIN—Review—Bailee.** Where, in a suit in replevin, the action is tried upon the theory that the property was in the possession of the defendants, and the trial court so finds, and such finding is unchallenged, this court will not consider the question of the right of the plaintiff to maintain such action because he may have been a bailee of the property in controversy.
2. **EVIDENCE as to Signature.** Where the trial court permits a witness, over the objection of the defendants, to write his signature in the presence of the jury, for their inspection and comparison with a signature to a chattel mortgage which is claimed to have been forged, and afterward, upon cross-examination, the defendants ask the witness to stand up and write his name in the presence of the jury, and then offer the same in evidence, *held*, that the defendants cannot now complain of such evidence.

*Error from Pottawatomie District Court.*

REPLEVIN. Judgment for plaintiff, *Gardner*, at the May term, 1888. The defendants, *Allen* and another, bring the case here. The opinion states the facts.

*W. F. Challis*, and *Thos. A. Fairchild*, for plaintiffs in error.

*D. V. Sprague*, for defendant in error.

Opinion by GREEN, C.: This was an action in replevin, commenced in the district court of Pottawatomie county by the defendant in error, to recover certain cattle. It seems from the evidence that John Wall was indebted to the plaintiffs in error in the sum of \$500, which had been secured by a chattel mortgage. On the 16th day of August, 1887, Wall executed a renewal note for such indebtedness in the sum of \$624.35, and, it is claimed by the plaintiffs in error, at the same time secured the same by giving a chattel mortgage upon the cattle in controversy. It was claimed by the plaintiff below that he purchased these cattle of Wall on the 18th day of November, 1887. On the 17th day of February, 1888, the plaintiffs in error, through C. E. Morris as their agent, went

---

Allen v. Gardner.

---

to the premises of the defendant in error and took possession of the cattle, but left them in the custody of the defendant in error, upon his executing a paper of which the following is a copy:

“REDELIVERY BOND.

“Whereas, on the 17th day of February, 1888, came W. A. Allen and son, by their agent, C. E. Morris, sheriff of Pottawatomie county, with a certain chattel mortgage given by John Wall to W. A. Allen & Son on 74 head of cows and calves, to secure the payment of a certain promissory note for \$624.35, the same being past due and unpaid, now the said Morris takes possession of 29 head of cows and 30 head of yearlings and two-year-olds next spring; and whereas I, C. E. Morris, turned said cattle over to F. P. Gardner to keep for him, the said F. P. Gardner agrees to deliver to the said Morris, on demand, the above-named cattle, or pay him \$775, or enough thereof to pay the above-named note and all costs that may accrue.

(Signed) F. P. GARDNER,  
D. R. ROUNDTREE.”

The defendant in error afterward demanded possession of the cattle from Morris, which was refused, and on the 2d day of March, 1888, commenced this action. The plaintiffs in error answered by general denial, and alleged that they had a special ownership in the cattle by virtue of a chattel mortgage. The plaintiff below denied the execution of this chattel mortgage. A trial was had before a jury, and a verdict and judgment rendered in favor of the plaintiff below for a return of the property. The plaintiffs in error ask a reversal, for two reasons: First, that the plaintiff below was estopped from claiming title to the stock as against the defendants, under the agreement entered into; that the instructions of the court failed to present the effect of this contract, and that the instruction upon such contract was erroneous; second, that the trial court erred in allowing a witness to write his name in the presence of the court and the jury and admitting the same as evidence. Upon the trial of the case, the real controversy seemed to have been the question of the genuineness of the chattel mortgage under which the plaintiffs in error claimed title to the cattle. The evidence was mainly directed

## Opinion of the Court.

to that one question. It was in evidence that the plaintiff below signed an agreement with the sheriff to keep the stock until the question of the ownership was settled. We cannot tell from the record who obtained possession of the property, but it does appear from a finding of the court that at the commencement of the action the property described in the petition was in the possession of the defendants, and that they still retained such possession at the time the verdict was rendered; and the judgment of the court was, that the plaintiff should have a return of the property replevied in the action, then in the possession of the defendants, or in default thereof, a money judgment for \$1,185 and costs. There was no objection to the finding of the court as to the possession of the stock. Upon this state of facts, we do not think any material error was committed by the trial court in sustaining the verdict of the jury. The case seemed to have been tried by both parties upon the theory that the defendants below had the possession of the stock, and the court so found, and we do not feel justified in disturbing such finding now. It is true as a general rule that a bailee receiving goods from his bailor cannot set up title in himself at the time of the bailment for the purpose of defeating a recovery by the bailor; (*Thompson v. Williams*, 30 Kas. 114;) but that question was not properly raised in the court below, and we do not think it should be now considered here for the first time.

The court instructed the jury that if the plaintiff willingly surrendered the cattle to the defendants, believing that they were being taken under the chattel mortgage, he would be estopped from afterward setting up any claim of ownership to the cattle; but if the jury should believe at the time he did surrender the cattle he believed that the agent of the defendants was taking the property under a legal process, and also surrendered them because he believed that the agent of the defendants was taking them as sheriff, then the plaintiff would not be estopped from setting up an ownership to the cattle after that time. We think, in the light of all the facts sur-



rounding the case, this instruction was a proper one for the jury.

The second assignment of error is, that the court permitted John Wall, over the objection of the defendants, to write his name in the presence of the jury, for their inspection and comparison with the signature to the chattel mortgage which the plaintiff claimed was forged. This became harmless error by the subsequent cross-examination of this witness. The witness was asked to write his name upon a table, standing, in the presence of the court and jury, and the signature so written was introduced in evidence by the defendants. Having adopted the same method as that of the plaintiff to test the genuineness of the witness's signature, we do not think the defendants can now be heard to complain of the introduction of such evidence. The judgment of the trial court should be affirmed.

By the Court: It is so ordered.

All the Justices concurring.

47	340
48	496
47	340
72	415

### CHARLES M. HILL *et al.* v. JOHN WAND.

1. **NEW TRIAL**—“*Thereupon*”—*Meaning*. “Thereupon the defendants filed in writing their motion for a new trial.” The word “thereupon” in this sentence, which appears in the record immediately after the verdict of the jury, construed as an adverb of time, and held to mean, “without delay or lapse of time.”
2. **LANDLORD AND TENANT**—*Estoppel*. A landlord who, having leased a portion of a building to H., and who informs W., occupying the balance of the building under a lease which is about to expire, that he has leased the whole building to H. from the expiration of his (W.'s) lease, with authority on the part of H. to sub-let, and advises W. to lease of H., and W. leases of H., is estopped from denying the authority of H. to sub-let to W. And the privies of said landlord taking under him by a subsequent lease are also estopped.
3. **EVIDENCE**—*No Cause of Action*. The evidence examined, and held not to establish any cause of action in favor of the plaintiff below, and that the court erred in overruling the demurrer thereto.

*Error from Shawnee District Court.*

ALL the material facts are stated in the opinion. Judgment for plaintiff, *Wand*, at the September term, 1888. The defendants, *Hill Bros.*, bring the case to this court.

*Johnson, Martin & Keeler*, for plaintiffs in error.

*Rossington, Smith & Dallas*, for defendant in error.

Opinion by STRANG, C.: Action for damages. The petition alleges that in June, 1886, John Wand was a druggist, with a stock of goods, in possession of the store rooms on lot 213 on Kansas avenue, Topeka, as the tenant of Allen Sells, owner of the Windsor hotel building, said store rooms being a part of said building; that at the same time the plaintiffs, Hill Brothers, as partners, were in possession of the Windsor hotel under a five-year lease from said Allen Sells; that the plaintiffs represented to the defendant, John Wand, that they also had a lease of the store rooms occupied by him, covering the period of the last three years of their hotel lease, and thus induced said Wand to take a lease of said store rooms of them for the period of three years, at the monthly rental of \$150; that, after giving Wand said lease, the plaintiffs sold their furniture and assigned their lease of said hotel to Passmore & Wiggins; that after Passmore & Wiggins obtained possession of said hotel, they notified the defendant that their predecessors, Hill Bros., never had any lease from Sells for the store rooms occupied by him, and that he must either surrender the possession of said rooms to them, or pay them a much higher rent; that he saw Mr. Sells and learned from him that, while he thought he had leased said store room to the Hills, he had ascertained that he had only contracted to lease it to them, and had not leased it; and that said Wand, learning, as he believed, that the Hills had no lease of said store rooms, and no authority to lease the same to him, and believing that his lease from them did not protect him, as he alleges it did not, was compelled, rather than to move out, to take a lease from Pass-

more & Wiggins and pay a much larger monthly rental, to wit, the sum of \$175 per month, whereby he was damaged in the sum of \$25 per month for three years, or in the aggregate \$900. The defendants below answered by a general denial. When the case was reached for trial and the plaintiff had introduced his evidence, the defendants demurred thereto, for the reason that it failed to establish a cause of action, which demurrer was overruled.

The first question to be discussed here is a question of practice raised by the defendant in error, who contends that there is no case here for review; that the case-made does not show that the motion for a new trial was filed in the court below within the statutory time, and that, therefore, under the decisions of this court, the case should be dismissed. Whether this contention is correct or not depends upon the construction of the word "thereupon," appearing in connection with the allegation of the filing of the motion for a new trial. The case-made recites that, "after hearing the arguments of counsel, and being duly instructed by the court, the jury, after due deliberation, returned to the court its general verdict and its special findings upon particular questions of fact stated by the defendants, which verdict and findings are in the words and figures following, to wit." Then follow the verdict and special answers, immediately at the end of which, and in close connection therewith, the following declaration appears: "Thereupon the defendants filed in writing their motion for a new trial, of which the following is a copy." Then follows a copy of the motion for new trial and the reasons therefor.

By reference to Webster's, Worcester's, and other dictionaries, we find the word "thereupon" defined as follows: "Thereupon—1st, upon that or this; 2d, on account of that; in consequence of that." In Anderson's Dictionary of Law it is thus defined: "Thereupon—without delay or lapse of time." From these authorities it will be seen that the word "thereupon" is employed to express a cause or condition, or is used as expressive of time. The record in this case shows the different stages of the trial, each succeeding the other in regu-

## Opinion of the Court.

lar order, down to and including the return of the verdict of the jury. It then proceeds as follows: "Thereupon the defendants filed their motion in writing for a new trial." As employed here and in this connection, we do not think the word "thereupon" refers to a cause or condition precedent, but that it is used as an adverb of time, and means, in the language of Anderson's work, above referred to, "without delay or lapse of time;" and that, with the balance of the sentence which it introduces, it means that immediately upon the return of the verdict of the jury the defendants filed their motion for a new trial. With this construction upon the word "thereupon," it follows that the motion for new trial was filed in time, and the case is properly here for review.

The second contention of the plaintiffs in error is that the court erred in overruling their demurrer to the evidence of the plaintiff below. Did the evidence of the plaintiff below establish a *prima facie* case against the defendants in the trial court? If it did not, then the court erred in its ruling; otherwise the ruling of the court was correct. The proper answer to this question must determine whether or not the plaintiff below had such a lease of the store rooms occupied by him in the Windsor hotel building, from Hill Brothers, as would protect him in such occupancy. If his lease from the Hills was sufficient to protect him in his rights therein stipulated, then he had no cause of action against them under the evidence, notwithstanding the fact that, ignorant of his rights under the law, he was induced by Passmore & Wiggins to take a new lease of them for the same premises at a higher rental; and the demurrer to the evidence should have been sustained. The Hills had a proper lease of the hotel building, except the store rooms occupied at the time by Wand, from the owner, Allen Sells, for a period running three years yet from the ensuing 1st of November, 1886. Said lease also contained the following clause:

"Said Allen Sells agrees to lease said store room, or rooms, to said Horace P. Hill upon reasonable notice by said Hill, at

---

Hill v. Wand.

---

a monthly rent of \$125 in advance, provided always that said Allen Sells can get peaceable possession of the same from the present occupant, and will connect said drug store with the hotel by a door or other opening."

Wand was in possession of said store room as tenant of Allen Sells, the owner, and his term would expire on the 1st day of November, 1886. In June, 1886, Wand and the Hills had made the connection between the drug store and hotel spoken of in the clause of the lease from Sells to the Hills, above recited, and were in some trouble about the amount to be paid by Wand to the Hills for the privilege of said opening, he wishing said passage-way kept open to enable him to sell cigars to the guests of the hotel. Pending the discussion of said difficulty and attempts to settle the same by Wand and the Hills, Allen Sells, the owner of all the property, and landlord of both Wand and the Hills, appears and advises Wand to settle the passage-way matter with the Hills. He said to Wand that he (Sells) had leased the store rooms to the Hills from the 1st of November following, and that if he (Wand) did not settle with the Hills, they would put him out at that time. Sells left Wand, and after a short time returned and told him that the Hills would settle the archway matter for \$25 per month and give him a lease of the store-room from November 1 at \$150 per month and the free use of the archway, and that he (Sells) would advise Wand to do that. Sells said he had leased to the Hills, and they could sub-lease to him. Wand concluded to do as Sells advised him, and settled up the archway dispute, and took a lease of the store rooms of the Hills for the remaining three years of their lease of the hotel, to wit, three years from November 1, 1886.

Afterward, sometime, the Hills sold out to Passmore & Wiggins, and assigned to them the hotel lease. Sometime after Passmore & Wiggins got possession of the hotel, they obtained from Sells a lease of the store rooms occupied by Wand. They then notified Wand to quit and surrender to them the rooms he occupied, and when Wand objected and informed them of his lease, they told him it was not valid be-

---

Opinion of the Court.

---

cause the Hills never had a lease of said rooms from Sells and no authority to rent them to him. Passmore & Wiggins, however, offered to rent the rooms to Wand, but at a much higher rental per month. Wand, believing his lease not good, finally rented of Passmore & Wiggins at a rental of \$25 per month in advance of the amount he was to pay under his lease from the Hills. Would the lease from the Hills to Wand for the store rooms, under all the circumstances under which it was made, have protected him in the possession thereof? We think it would. The lease from the Hills to Wand was a proper lease in writing for the premises occupied and to be occupied by Wand. The Hills actually had in writing, at the least, an agreement on the part of Sells to lease to them the rooms occupied by Wand for a stipulated rental, upon reasonable notice, provided he could get peaceable possession of the same from Wand. The evidence shows that he either had notice or it was waived. The peaceable possession of the premises was surrendered to him by Wand, and the opening between the drug store and hotel had been made; so that all the conditions upon which Sells was to lease the premises occupied by Wand to the Hills were executed. At this juncture Sells, who has agreed in writing to lease to the Hills, appears and informs Mr. Wand that he has leased to the Hills, and advises and, in the language of Wand, begs him to take a lease from the Hills, saying they have authority to sub-let. In pursuance of Sells's advice and importunities, Wand does take a lease from the Hills and remains in possession thereunder. After all that had transpired, could Mr. Sells have come forward and demanded and obtained possession of said rooms from Wand during the life-time of Wand's lease from the Hills, upon the ground that the Hills had no authority to make the lease to Wand? We think not. Mr. Sells would be fully estopped from denying the authority on the part of the Hills to make the lease in question, and such lease would amply protect Mr. Wand in his rights thereunder, as against Mr. Sells. Having told Wand that he had leased the rooms to the Hills, that they had au-

<sup>2</sup> Landlord and tenant—estoppel.

thority to sub-let, and thus induced Wand to lease of the Hills, he (Sells) could never be heard to say that the Hills did not have authority to make the lease to him. The law will not tolerate such conduct, and declares whoever indulges in it forever estopped from denying the authority he has affirmed to exist.

"In accordance with this case it is now a well-established principle, that where the true owner of property, for however short a time, holds out another or allows another to appear as the owner of or as having full power of disposition over the property, the same being in the latter's actual possession, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. . . . Such rights do not depend upon the *actual* title or right or *authority* of the party with whom they have directly dealt, but are derived from the conduct of the real owner, which precludes him from disputing against them the existence of the title or right or *power* which he caused or allowed to appear to be vested in the party making the sale." (Bigelow, Estop. 560.)

"Where the owner of property confers upon another an apparent title to or *power of disposition over it*, he is estopped from asserting his title as against an innocent third party, who has dealt with the apparent owner in reference thereto without knowledge of the claims of the true owner. The rights of such third party do not depend upon the actual title or authority of the one with whom he dealt, but upon the act of the owner, which *precludes* him from disputing the title or *authority* he has apparently conferred." (*McNeil v. National Bank*, 46 N. Y. 325.)

These two authorities which are so near alike, the one from Bigelow on Estoppel and the other from a decided case in the New York courts, seem to be in point in this case. These authorities hold, that where the owner of property holds out another as having power of disposition or authority over the same for any purpose, he is estopped from denying the existence of such power of disposition or authority over the property as against the rights of a person who has innocently dealt with him who is thus given such apparent power of disposition or authority. Allen Sells not only told Wand that he had leased the store rooms to the Hills, but told him they had

## Opinion of the Court.

power to sub-let, and "begged" Wand to take a lease of the Hills. In this he not only held the Hills out to Wand as having full power of disposition of the rooms by lease, but advised Wand to take a lease from the Hills under the power of disposition he declared they possessed. Wand dealt with the Hills, believing, from the representations of Sells, that they had full power of disposition over the rooms he desired. Can it be that Sells could afterwards be heard to deny, as against Wand, that the Hills had full power of disposition over the store rooms leased by him from them? We think not. If he could not deny the existence of such power in the Hills by word, could he, by any act of his, destroy, set aside or annul the apparent power of disposition over said rooms existing in the Hills? Again we say no. "The rights of such third party do not depend upon the *actual authority* of the one with whom he dealt, but upon the *act* of the *owner*, which precludes him from disputing the authority he has apparently conferred." (46 N. Y. 325, *supra*.) So, in this case, the rights of Wand, under the lease from the Hills, did not depend upon any *actual authority* or *power of disposition* over the rooms leased in the Hills, but upon the *apparent power of disposition thereof* conferred upon them by Sells, *holding them out to Wand as rightfully possessed of such power*. That is, it mattered not, so far as Wand's rights under his lease from the Hills were concerned, whether the Hills had a lease from Sells or not; after Sells had represented them to Wand as having one, with power to sub-let, he could not deny that they did have one containing such authority. This being true, a subsequent lease from Sells to Passmore & Wiggins conferred upon them no greater rights as against Wand than Sells had, and no more power to deny the authority of the Hills to make the lease to Wand than Sells himself possessed. The Hills did not at any time dispute their power to lease to Wand, but all the time affirmed that their lease to Wand was a good one, and that it fully protected him in the enjoyment of his rights stipulated therein. As neither Sells, nor Passmore & Wiggins, could dispute the validity of Wand's lease from the Hills, we take it that such



---

Hill v. Wand.

---

lease would have protected him in the enjoyment of the rights in said lease stipulated against all the world. *Anderson v. Armstead*, 69 Ill. 452, holds with the two authorities above cited, and says the third party will be protected.

"If one whose name is signed by another to a deed so far acknowledges the deed as to induce third persons to act on it as his, he may, without evidence in writing of an estoppel, be held precluded from subsequently denying the deed." (*Goodell v. Bates*, 14 R. I. 65.)

"Where the owner or the person having an interest in property represents another as the owner, or permits him to appear as such, or as having authority over it, he will be estopped, to deny such ownership or authority against persons who, relying on his representations or silence, have purchased or acquired interests in the property." (7 Am. & Eng. Encyc. of Law, 18.)

"Privies are bound by or may take advantage of an estoppel *in pais*." (*E. A. Rld. Co. v. T. & C. R. Rld. Co.*, 78 Ala. 274; *Karnes v. Wingate*, 94 Ind. 594; *Timon v. Whitehead*, 58 Tex. 290; *Wood v. Seely*, 32 N. Y. 105.)

"Where a person is estopped, his creditors attaching the property in question are estopped also." (*Parker v. Crittenden*, 37 Conn. 148.)

A point is made that the special findings of fact are not sustained by the evidence, but that the jury in making them ignored all the evidence in the case relating to the questions to which their findings are answers. The findings are not only not supported by any evidence, but are directly against all the evidence relating thereto. With our view of the law of this case, this is all we care to say about the findings. We think the lease from the Hills to Wand protected Wand in the enjoyment of all the rights he stipulated for therein. It follows, then, that if Wand, having a lease that would protect him in his rights, allowed Passmore & Wiggins, or anyone else except the Hills, to persuade him to take a subsequent lease at a higher rental, that the Hills were not to blame, and having done so and paid a higher rental, he had no cause of action against the Hills therefor, and the demurrer to the evidence should have been sustained.

3. Evidence—no  
cause of ac-  
tion.

It is recommended that the judgment of the district court be reversed, and the case remanded for new trial.

By the Court: It is so ordered.

All the Justices concurring.

---

THE MISSOURI PACIFIC RAILWAY COMPANY V. PETER  
YOUNGSTROM.

**RAILROAD COMPANIES—Roads through Inclosed Lands—Fences.** Under the provisions of chapter 154 of the Laws of 1885, compelling railroad companies to fence their roads through lands inclosed with a lawful fence, before the owner of the lands can recover the value from a railroad company of a fence built by him in accordance with the provisions of the statute, he must prove that his lands, or a part thereof, which are claimed to be inclosed have a lawful fence—that is such a fence as is defined by the statute to be a legal or lawful fence.

*Error from Wilson District Court.*

THE opinion states the case.

*W. A. Johnson*, for plaintiff in error.

*S. S. Kirkpatrick*, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: Peter Youngstrom commenced his action against the Missouri Pacific Railway Company to recover the value of a fence alleged to have been built by him along the line of the right-of-way of the Leroy & Caney Valley Air-Line railroad through his premises, and also for an attorney's fee. He alleged that the Missouri Pacific Railway Company was operating the Leroy & Caney Valley Air-Line railroad, as lessee.

Trial before the court without a jury, at the May term, 1888. Judgment was rendered in favor of the plaintiff be-

---

*Mo. Pac. Rly. Co. v. Youngstrom.*

---

low and against the railway company for \$45 for the value of the fence constructed, and \$25 as a reasonable attorney's fee, together with the costs, taxed at \$9.35. The railway company excepted, and brings the case here.

The railway company claims that chapter 154, Laws of 1885, to compel railroad companies to fence their roads through lands inclosed with a lawful fence, is unconstitutional. This court has recently decided otherwise. (*Mo. Pac. Rly. Co. v. Harrelson*, 44 Kas. 253.) It is next claimed that the trial court erred in overruling the demurrer of the railway company to the evidence of plaintiff below, and also erred in rendering judgment against the railway company because of the absence of sufficient proof. The petition alleged, among other things, "that before and at the time of the construction of the Leroy & Caney Valley Air-Line railroad, in 1886, through the premises of the plaintiff, said premises were inclosed with a good, sufficient and lawful fence." There was no evidence introduced upon the trial showing or tending to show that the premises of the plaintiff below, or any part thereof, were inclosed with a lawful fence. The only evidence concerning the inclosure of the premises was as follows: "Peter Youngstrom testified in his own behalf:

"Ques. What part of section 25 do you own, Mr. Youngstrom? Ans. The north half.

"Q. This Leroy & Caney Valley Air-Line road runs through it? A. Yes, sir.

"Q. Were your premises fenced at the time the railroad was constructed through there? A. Yes, sir.

"Q. Well, you are the owner of those premises, are you? A. Yes, sir.

"A. What time was the railroad constructed through there? A. About two years ago.

"Q. In 1886? A. I suppose so; yes, sir."

Under the provisions of chapter 154, Laws of 1885, the plaintiff was not entitled to recover unless he showed that his premises, or a part thereof, were inclosed with a *lawful fence*. Paragraphs 3060-3064, General Statutes of 1889, define what are legal or lawful fences. Evidence that premises are fenced

is not sufficient to show that the premises are inclosed with a legal or lawful fence, within the terms of the statute. The burden of proof was upon the plaintiff below, and in the absence of proof of a lawful fence, the demurrer to the evidence should have been sustained. The plaintiff was not entitled to any judgment.

In the case of *Mo. Pac. Rly. Co. v. Harrelson*, supra, it was expressly stipulated by the parties, in writing, that the premises "were inclosed with a good, sufficient and lawful fence." There was no such stipulation in this case, and no proof that the fence inclosing the premises was a *legal* or *lawful* one.

The judgment of the district court will be reversed, and the cause remanded.

All the Justices concurring.

---

THE WICHITA & WESTERN RAILROAD COMPANY V.  
FRANK E. JOHNSON.

47 351  
51 377

1. *NEW TRIAL—Time of Filing Motion—Presumption.* Where an entry of the proceedings taken in a case shows when the trial was begun, but does not affirmatively show when the final decision was made, and it is shown that a motion for a new trial was filed five days after the trial was commenced, which motion was entered and allowed, it will be presumed by the supreme court, for the purpose of upholding the judgment of the court below in granting a new trial, that the motion was filed within three days after the final decision was made.
2. *EVIDENCE—Demurrer—Jury.* The evidence offered by the plaintiff below is found to be sufficient to take the case to the jury, over a demurrer interposed against it.

*Error from Sedgwick District Court.*

THE case is stated in the opinion.

*Geo. R. Peck, A. A. Hurd, and C. N. Sterry*, for plaintiff in error.

*Crosby & Rusk*, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J.: Frank E. Johnson brought this action against the Wichita & Western Railroad Company to recover damages for personal injuries alleged to have been negligently inflicted by the company. It appears that about two miles southwest from Wichita there is a grade crossing, at almost right angles, of the railroads of the Wichita & Western Railroad Company and the St. Louis, Fort Scott & Wichita Railroad Company. On the night of December 24, 1888, while a passenger train of the St. Louis, Fort Scott & Wichita Company was passing over the crossing, a freight train of the Wichita & Western Company ran through the train of the former company and destroyed the baggage car, on which Johnson was employed in the capacity of express messenger and baggage master. After the collision Johnson was found some distance away in an injured condition; and he alleges that the collision and injury resulted from the negligence of the plaintiff in error. At the trial, Johnson introduced his evidence and rested, and the railroad company then filed a demurrer, challenging the sufficiency of the evidence, and the court, upon an argument, sustained the demurrer, and rendered judgment for costs in favor of the company. Afterward, the court upon motion granted Johnson a new trial, and of this order the company complains.

It is contended that the motion for a new trial was filed out of time, and therefore the court was without authority to grant it. It is claimed that the record shows the judgment upon the demurrer to have been given on October 25, 1888, and that the motion for a new trial was not filed for five days thereafter, nor until October 30, 1888. The record brought here is somewhat obscure as to when some of the steps were taken in the case. It shows when the demurrer to the evidence was filed, and also when the motion for a new trial was filed, but it does not affirmatively show when the decision upon the demurrer was made. In an entry made on October 31, 1888, it is recited that the case came on to be heard October

## Opinion of the Court.

25, 1888; then follow recitals of the impaneling of the jury, the introduction of the evidence of the plaintiff, the filing of a demurrer to the evidence, the argument of the same; then that the demurrer was sustained, the jury discharged, and judgment for costs awarded to the defendant; that a motion for a new trial was thereupon filed, giving a copy of the same, on which there is an indorsement that it was filed October 30, 1888. Later, there is an entry that the motion for a new trial was allowed on January 1, 1889. In the entry of October 31, the only date mentioned is October 25, when the trial commenced. If the decision on the demurrer was made on that day, the motion for a new trial was not in time. Some of the language used in the entry, including that referring to the filing of the motion for a new trial, in some degree would indicate that all of the steps were taken on the day mentioned in the entry. But it is clear that the motion for a new trial was not filed on that day; and it appears to us that a fair interpretation of the record is, that the entry contains a recital of all that occurred from the 25th of October, when the trial commenced, until the 31st of October, when the entry was made. If all had transpired on the 25th of October, probably all would have been entered on the journal of that day. The record shows when the demurrer was interposed, but it was probably held under advisement and decided at a later day, prior to October 30, when the motion for a new trial was filed. As there is nothing in the record which affirmatively

1. New trial—  
time of filing  
motion—pre-  
sumption.

shows when the decision was made, and as the motion for a new trial was entertained and determined by the court, it should be presumed, for the purpose of upholding its judgment, that the motion was filed within three days after the decision was made. If the court had refused the motion, and the record was silent as to the date when the decision was made, it would be presumed by this court, for the purpose of upholding the judgment of the court below, that the motion was not made in time. (*Hover v. Tenney*, 27 Kas. 133.) So, here, where the date of the decision is omitted from the record, we will, for the purpose of

sustaining the ruling of the district court, presume that the decision was made within three days preceding the filing of the motion for a new trial. Error is never presumed, but must be affirmatively shown, and in the absence of facts affirmatively showing the decision of the court to be erroneous, we will presume it to be correct.

It is next insisted that there were no reasons which justified the court in granting a new trial. The right to a new trial turns upon the proposition as to whether the evidence offered by Johnson was sufficient to take the case to the jury, over the demurrer interposed by the railroad company, and it is still insisted that it was insufficient. An examination of the testimony, however, satisfies us that this claim cannot be successfully maintained. Upon a demurrer to the evidence, the court must look at the testimony in the light most favorable to the plaintiff, and allow all reasonable inferences in his favor. It "cannot weigh conflicting evidence, but must consider as true every portion of the evidence tending to prove the case of the party resisting the demurrer." (*Wolf v. Washer*, 32 Kas. 533; *Rogers v. Hodgson*, 46 id. 276; same case, 26 Pac. Rep. 732.) Viewed in this light, it is clear that there is evidence tending to establish the issues made by the pleadings, and therefore the demurrer should have been overruled.

There is testimony tending to show that the train on which Johnson was riding was on time; that it was brought to a full stop near the crossing, and the whistle of the engine sounded, while those in charge looked to see if there were any approaching trains on the other road; that they did not see any, and that they then proceeded to cross at a moderate rate of speed, when the locomotive of the Wichita & Western freight train struck the baggage car with great force, knocking it to pieces, and passing on through the passenger train. There is some testimony tending to show that the freight train approached the crossing at a high rate of speed, and proceeded over the crossing without slackening its speed or stopping to ascertain whether it was entitled to pass over the crossing, and thus negligently collided with the train of the other company, which was en-

titled to the crossing. It is proper to state, however, that some of the testimony is inconsistent with that which has been mentioned, and would tend to show a lack of care on the part of the engineer of the St. Louis, Fort Scott & Wichita train, and still more which in some degree tends to show that the Wichita & Western train stopped and whistled for the crossing, and obtained the right to pass over in advance of the other train. As before stated, however, we cannot weigh the conflicting evidence, and in view of the fact that there is to be another trial, we will not at this time enter upon a detailed

examination of that which has been given. It is enough for the present to say that there was sufficient testimony to take the case to the jury, and therefore the order of the court granting a new trial will be affirmed.

All the Justices concurring.

### J. C. GOODRICH *et al.* v. THE BOARD OF COMMISSIONERS OF ATCHISON COUNTY.

1. **DEMURRER**—*Objection to Evidence—Trial.* On the trial of a cause, a defendant may object to the reception by the court of any evidence under the petition, although his demurrer to the same petition has previously been overruled; and the court commits no error by entertaining and passing upon said objection.
2. **HIGHWAY**—*Opening over Mortgaged Land.* For all purposes of establishing and opening highways under our statute through mortgaged premises, the mortgagor in possession is to be regarded as the owner of the land.

#### *Error from Atchison District Court.*

ALL the material facts are stated in the opinion herein, filed at the session of the court in November, 1891.

*J. T. Allensworth*, for plaintiffs in error.

*W. T. Bland*, county attorney, and *James W. Orr*, for defendant in error.

47	355
50	118
47	355
52	469
53	172
53	687
47	355
54	260
47	355
58	145
47	355
62	413
47	355
66	312
47	355
74	783
47	355
75	478



Opinion by STRANG, C.: September 24, 1881, one Silas H. Hamilton and Frances B. Hamilton gave Alexander M. Sutherland a mortgage upon a quarter-section of land in Atchison county to secure the sum of \$5,300, which mortgage was placed upon record October 9, 1883. Sutherland duly assigned said mortgage to J. C. Goodrich, and on the same day Goodrich assigned an interest in said mortgage of the value of \$2,318.05 to Ann B. Sutherland, both of which assignments were placed of record on the 12th day of October, 1883. January 8, 1884, a petition was filed with the county clerk of Atchison county, asking the board of county commissioners to cause a public road to be laid out, in part across and over the land covered by the mortgage above described. March 25, 1884, the road prayed for was established across said land, the viewers assessing damages to the said land in the sum of \$250, and awarding the same in the name of T. C. Beard, agent of the mortgagors. Afterward said T. C. Beard appeared before the board of county commissioners and procured an increased allowance of damages in the sum of \$100, making a total award of damages of \$350, which was paid to said Beard. During the time when said road was being laid out, as well as when the award of damages was paid to Beard, the mortgagors were in possession of the land, and had been ever since the execution of the mortgage. February 3, 1885, the mortgage was foreclosed in the United States circuit court, and the land sold by a master to the plaintiff J. C. Goodrich, for the sum of \$2,500. April 11, 1887, this action was begun by the plaintiffs to recover the amount of said award from the board of county commissioners of Atchison county, claiming that they were entitled to the damages as mortgagees of the land, and alleging that said damages were wrongfully paid by said board to the agent of the mortgagors. March 7, 1888, defendants filed a demurrer to the petition, which demurrer was overruled by the Hon. S. H. Glenn, judge *pro tem.*, the regular judge being disqualified to sit in the case. Answer and reply were afterward filed, and the case came on for trial February 5, 1889, before the

## Opinion of the Court.

regular judge of the district, Hon. Robt. M. Eaton, who in the meantime had been elected and qualified. A jury was obtained, and a witness placed upon the stand, when the defendants objected to any evidence being received under the petition, for the following reasons: 1st, "because this court has no jurisdiction to try this case;" 2d, "because the petition does not state facts sufficient to constitute a cause of action against the defendants." This motion was sustained. A motion for a new trial was then filed, which, upon a hearing, was overruled, and the case brought here for review.

The first question presented is raised by the contention of the plaintiffs in error that the action of the court in overruling the demurrer to the petition settled the law of the petition so far as the trial court was concerned; that having overruled a demurrer to the petition, thus holding the petition to state a cause of action, the trial court could not subsequently in the same trial, when evidence was offered under the petition, sustain an objection to the reception of such evidence on the ground that the petition did not state facts sufficient to constitute a cause of action; that when the court overruled the demurrer to the petition, such action of the court was a final adjudication in favor of the plaintiff as to the sufficiency of the petition, and if the defendant felt aggrieved thereby, its only remedy was by appeal and not by objecting to the introduction of the testimony. We do not think this position is tenable. This is a jurisdictional question, and we think the defendant may raise it at every stage of the trial. Though the court has overruled a demurrer, a party defendant may, in the same

trial, object to the reception of evidence under the petition, and thus again secure the attention of the court to and challenge its judgment upon the same question raised by the demurrer; and if the court overrules its objection, it may still raise the question, before the final judgment against it, by a motion for a new trial. The object of a motion for a new trial is to call the attention of the court to alleged errors, that the court may have an opportunity to correct its own errors, if it concludes, even after the

1. Demurrer—  
objection to  
evidence—  
trial.

trial, it has made any, or suffered any to be made. If it is proper to permit the defendant to argue the question raised by the demurrer anew on a motion for a new trial, we know of no reason why it is not proper to raise and argue the question by an objection to the reception of evidence under the petition. The object sought to be obtained is the same. By filing an answer the defendant waives his right to demur, but he does not thereby waive his right to raise the same question that he could have raised by demurrer to the petition, by objecting to the reception of evidence under the petition. We have examined the cases cited. The case of *Sanford v. Weeks*, 39 Kas. 649, instead of supporting the position of the plaintiffs, seems to militate against such position so far as it is in point. In that case Sandford demurred to the petition, which was overruled, and no exception taken. He then objected to the reception of evidence under the petition, which was the same practice that prevailed in this case, and which is now objected to. That case also holds that if the defendant had taken exceptions to the overruling of his demurrer, the question raised thereby might have been reviewed by this court.

There is nothing in the case of the *U. P. Rly. Co. v. Estes*, 37 Kas. 229, that supports the contention of the plaintiffs in error. That case simply holds that a party who seeks to have a ruling on a demurrer to a petition reviewed by this court may either stand on his demurrer, and bring the case direct to this court for review, or take his exception to the ruling, file his answer, and go to trial, and after trial bring his case here and have the ruling on the demurrer reviewed. That a defendant whose demurrer to the petition is overruled may except, and stand on his demurrer, and come to this court at once and have the question settled as to the sufficiency of the petition, is not denied in this case. That question is not involved in the case. The case cited, however, settles the question that he need not stand on his demurrer and come at once to this court, but may take his exception, answer over, and at the end of the trial come to this court and have the question raised by his demurrer reviewed. The cases cited from Ohio, Nebraska and New

York relate simply to the question as to whether a defendant whose demurrer has been overruled can answer over, and afterward, at the end of the trial, have the ruling on his demurrer reviewed by the superior court. What the law may be in those states upon that question is not very material, as that precise question is not raised in this case, and if it were, the cases in 37 and 39 Kansas, above cited, settle the law so far as this state is concerned.

The next and more important question in this case is, "Are the plaintiffs, mortgagees out of possession, owners" within the meaning of ¶ 5477, General Statutes of 1889? Mr. Lewis, in his work on Eminent Domain, § 324, enters upon the discussion of the general subject as to whether mortgagees are necessary parties to condemnation proceedings, by saying that "the authorities on the question are not only conflicting, but very unsatisfactory." The same author adds: "The cases go almost entirely upon the language of the statutes, as though it was a matter entirely within the control of the legislature." So, in our examination of the question, we have found the authorities thereon inharmonious, and depending very largely upon the language of the statutes, and upon the law relating to mortgages in the states where the decisions are found. In those states where the common-law doctrine relating to mortgages prevails, where the mortgagee is held to be the possessor of a defeasible title to the land, it is generally held that he is a necessary party to the condemnation proceeding; while in states where the mortgage is held to be a mere security creating a lien upon the property, but vesting no estate in the mortgagee, it is generally held that the mortgagee is not a necessary party to condemnation proceedings. In some of the states where the decisions depend upon the language of statutes, such language is broader than it is in others. In some states the statute simply requires notice to be given to the "owner," while in other states the language of the statute in relation to notice requires it to be given to the owner, mortgagee, lien-holder, lessee or other person having an interest therein.

The law of mortgages is well defined in our state. In *Chick v. Willetts*, 2 Kas. 379, a mortgage is declared to be a mere security, creating a lien upon the property, but vesting no estate whatever in the mortgagee, either before or after condition broken. It gives no right of possession, and does not limit the mortgagor's right to control the property.

In *Vanderslice v. Knapp*, 20 Kas. 647, Mr. Justice VALENTINE, writing the opinion, says "that a mortgagor of real estate has the right to the possession of the mortgaged property, and to sever and remove timber, wood, sand, earth, coal, stone or anything else therefrom, and to sell the same, unless it unreasonably impairs the mortgage security. When it unreasonably impairs the mortgage security, the remedy of the mortgagee is not at law, but in equity; not replevin to recover the property severed from the realty, but generally injunction to restrain the commission of waste upon the realty." Upon this question of the law of mortgages, see *Clark v. Reyburn*, 1 Kas. 281; *Curtis v. Buckley*, 14 id. 456; *Pritchett v. Mitchell*, 17 id. 358; *Alexander v. Shonyo*, 20 id. 705; *Robbins v. Sackett*, 23 id. 304; *Seckler v. Delfs*, 25 id. 165; *Tomlinson v. Thompson*, 27 id. 72; *Perkins v. Dibble*, 10 Ohio, 439; *Norwich v. Hubbard*, 22 Conn. 587; *Astor v. Hoyt*, 5 Wend. 615. The statute of our state upon the question under discussion (§ 5477, Gen. Stat. of 1889) reads as follows:

"It shall be the duty of at least one of the petitioners to cause six days' notice to be given in writing to the owner or owners, or their agents, if residing in the county—through whose land such road is to be laid out and established—of the time and place of meeting as specified in the notice of the commissioners."

The notice of the commissioners is pointed out in § 5476 of the same statutes, and requires the county clerk to give notice "by advertisement set up in the county clerk's office and every municipal township through which any part of said road is designated to be laid out, for at least 20 days; and by publication for two consecutive weeks in a newspaper, if there be one published in the county, setting forth that such petition

## Opinion of the Court.

has been presented, giving the substance thereof, and that viewers will on the day designated proceed to view said road and give all parties a hearing." In view of the statute in our state in relation to notice in road proceedings, and the law relating to mortgages, and rights of mortgagors and mortgagees, we do not think it was necessary to serve notice on the plaintiffs for the purpose of establishing the road which was laid out across the lands upon which they at the time held a mortgage. There is nothing in our statutes that requires service of notice upon any one in such proceeding except the "owner." It has been seen that in our state a mortgagee of land is not the owner thereof. The mortgagor holds the legal title, and, in the absence of stipulations to the contrary, the right of possession. He is regarded as the owner of the land, and when in possession by himself or agent notice to him or his agent is, in proceedings to establish a public road, notice to the "owner," to the full intent of our statute requiring such notice.

The case of *Railroad Co. v. Wilder*, 17 Kas. 246, goes a long way toward settling the law of this case. In that case, Mr. Justice VALENTINE, speaking for the court, says:

"We think Wilder is entitled to the same damages as though he owned the unincumbered fee of the land. DaLee is not entitled to any portion of such damages. DaLee is entitled to the \$2,000 which Wilder owes him, and to nothing more, except that he holds the legal title to the land (and possibly a lien on the damages awarded if he choose to assert that lien) as a security for his claim on Wilder."

The case of *Kuhn v. Freeman*, 15 Kas. 423, is in line with the above case. The law upon this question is fully settled in many of the states.

In *Parish v. Gilmanton*, 11 N. H. 293, Justice Woods says:

"In the third place, it is objected that certain mortgagees of land over which the road is laid were not notified of the proposed laying out of the way, and that no damages were awarded them. By the first section of the statute, as already seen, it is provided that notice shall be given to the owners of the land through which the highway is to be laid out. Whether the exception can prevail depends upon the proper

---

Goodrich v. Comm'rs of Atchison Co.

---

decision of the question whether the mortgagee is to be regarded as the owner of the land for the purpose of receiving notice, and having damages awarded for the injury done in taking easement to the lands mortgaged. It does not appear in the present case that the mortgagee was in possession. In such cases, we think that the mortgagor in possession is to be regarded as the owner, and as such is entitled to the notice. Indeed, it would now seem to be a firmly-established doctrine in this state, that the mortgagee is entitled to have his mortgage interest regarded as real estate, and himself as the owner of the land mortgaged, so far only as to enable him to protect and avail himself of his just rights intended to be secured to him by the mortgage, and to give him all necessary and appropriate remedies for that purpose, and that in all other respects, and for all other purposes, it is to be treated as a chattel interest; and we think this is not one of the cases in which the mortgagee is entitled to be regarded as the owner of the land mortgaged."

In *Read v. City of Cambridge*, 126 Mass. 427, the court says:

"In every taking of land for public use, the mortgagor is regarded in this commonwealth as having, at law, the entire estate in the premises, and entitled to recover the whole value thereof, estimated according to the provisions of the statute, without any deduction on account of the mortgages and liens thereon."

In *Paine v. Woods*, 108 Mass. 160, Wells, J., delivering the opinion of the court, says:

"This is a complaint of flowage, under the mill act. The complainant is the mortgagor in possession of the land flowed. The mortgage was given before the erection of the dam of the respondents. The mortgagee has never entered or taken any steps toward foreclosure. The ground of defense is, that the complaint cannot be maintained by the mortgagor without joining the mortgagee. The respondents insist that, as the mortgagee will not be bound by the judgment, they will be exposed to the risk of making double compensation for the same injury, if these proceedings are maintained. This objection is not tenable. For all the purposes of these proceedings, the mortgagor in possession is a sufficient party, without joining the mortgagee."

"A mortgagee out of possession is not the proprietor of the mortgaged premises, and in common parlance is never spoken of as such; nor is he so recognized in a legal sense. In truth the mortgagee has only a lien, and cannot be considered or treated as a proprietor or owner of the mortgaged estate." (*City of Norwich v. Hubbard*, 22 Conn. 587.)

"In laying out new highways, either by selectmen or by the county courts, or in repairing old ones, no provision is made by law for notice to be given to mortgagees, nor in practice is this ever done. The interests of the mortgagees are not regarded in these proceedings. They are necessarily connected with the interests of the mortgagor, and in this respect subject to them." (*Whiting v. City of New Haven*, 45 Conn. 305.)

"In a complaint under the mill act by a mortgagor, it is no defense that the respondent has acquired the right of the mortgagee by an assignment of the mortgage." (*Vaugh v. Wetherill*, 116 Mass. 138.)

"The mortgagor of land, taken by a railroad corporation for the purpose of their road, may recover the full amount of damages, without regard to the mortgagees." (*Ballard v. Ballard Vale Co.*, 5 Gray, 468.)

We have examined the case of *Severin v. Cole*, 38 Iowa, 463. The cases therein referred to in 2 Ohio State, 114, and 4 id. 101, in support of the position taken in that case, relate to mechanics' liens, and are not analogous cases, and do not depend upon the same principle as the case in which they are cited, nor upon the same principle as the case at bar.

The case of *Ballard v. Ballard Vale Co.*, 5 Gray, 468, does not sustain the opinion promulgated in the Iowa case. The case in 5 Gray was under the mill act of Massachusetts. It was brought by the mortgagee in possession after foreclosure, and did not claim damages for any of the period of time during which the mortgagor was in possession of the premises. In fact the case conceded that, under the statute which provided for the assessment of annual damages, the mortgagor is entitled to such annual damages while in possession. And it was undecided and left an open question as to whether the mortgagor in possession could, under the same statute which provided also for the assessment of damages in gross, that is,



damages for all time, elect to take damages in gross and thus deprive the mortgagee of the right to recover annual damages after the reduction of the land to his possession; and whether the mortgagor in possession could release the owners of the mill, the dam to which caused the overflow, from the damages for all time, and thus conclude the mortgagees after obtaining possession. Merrick, J., in that case, uses the following language:

"The respondents [assignees of the mortgagor] have never had any interest except that which they derived from Marland, the mortgagor. His deed to them was a mere quitclaim and release of all his right, title and interest in the premises; and these consisted only of the right of redemption, and the right of possession, previous to a breach of the condition of the mortgage. Of the former the respondents have never availed themselves; and of the latter they have had the uninterrupted advantage and enjoyment—no claim being made for damages occasioned by the flowing before the time when the complainant entered upon and took possession of the premises for the breach of the condition of the mortgage and to foreclose the right in equity of redemption. The right of the respondents is now superseded by the paramount title of the complainant; and they have therefore no defense to set up against the complaint, and can show no reason why it should not be maintained. It has been argued, for the respondents, that a mortgagor in possession has the power and right effectually to release and discharge a mill-owner from all claims for damage which have been or which may be occasioned to the mortgaged premises, either by the past or future maintenance of the dam, used and to be used forever, for the purpose of raising water to work his mill. Without intending in any degree to sanction that position, as a principle of law resulting from a just interpretation of the provision of the statute for the support and regulation of mills, it is sufficient to say that the determination of this question is not requisite in this case; for it does not appear that Marland (mortgagor) has released or discharged, or even attempted to release or discharge, the respondents from all the claim to which they were or might become liable by reason of the maintenance of their dam, and the consequence to the complainant's land by overflowing it with water."

Mr. Justice Cole, in the opinion of the Iowa case, says: "The case of *Breed v. Eastern Rld. Co.* is only reported as a

## Opinion of the Court.

note to the case of *Ballard v. Ballard Vale Co.*, *supra*." That is true, but the principle decided in the case of *Breed v. Eastern Rld. Co.* is carried back and made a part of the syllabus in the case of *Ballard v. Ballard Vale Co.* With this examination the Iowa case loses some of its force, and we prefer to follow the precedents cited from other states, as being in line with our authorities so far as this court has already gone in analogous cases, and also in line with our numerous decisions affecting the law of mortgages, and the rights respectively of mortgagors and mortgagees, and hold that, for all the purposes of opening highways, the mortgagor in possession is to be regarded as the owner of the land. Whether a mortgagee may, by a proceeding in equity, intervene, and have the damages applied in accordance with what the court under all the circumstances might consider as equitable, we are not called upon in this case to decide, and therefore leave that question open, to be settled in a case wherein it is raised. It will be seen that there is no provision in ¶ 5477 for notice to non-resident owners who have no agent in the county; nor is there elsewhere in our statute any provision for notice to them, except the notice required to be given by the county clerk in ¶ 5476, above referred to. As that notice is required to be posted in the county clerk's office and each municipal township through which the road or any part of it is to be established, and also published in a newspaper of the county, if there is one in the county, the legislature probably intended this notice to reach non-resident owners. But as, under our view of the law, the plaintiffs — mortgagees out of possession at the time the road was established — are not to be regarded as the "owners," it matters little, so far as this case is concerned, what the legislature might have intended as to non-resident owners.

We recommend that the judgment of the district court be affirmed.

By the Court: It is so ordered.

All the Justices concurring.

2. Highway—  
opening over  
mortgaged  
land.

---

Guy v. Doak.

---

A. E. GUY, as Receiver of J. H. Allen et al., v. D. P. DOAK et al.

1. RECEIVER—*Appointment before Action Brought.* Where a receiver is appointed before the intended action is commenced, the appointment is void; but where the intended action is afterward commenced and the defendant afterward makes a voluntary appearance and presents a motion to remove the receiver, and the court or judge overrules the motion, the person originally appointed as receiver will then become such and be such from that time on.
2. REPLEVIN—*Measure of Recovery.* Where an action of replevin is commenced by a person who was appointed receiver, but whose appointment was void, and afterward, as between the parties, he becomes such receiver, and in that manner obtains an interest in the property in controversy, of which property he has the possession, while he must fail in the replevin action for the reason that when he commenced the same he had no right to do so, yet the defendant cannot recover in the action to an extent greater than his own special interest in the property in controversy.

*Motion for Rehearing.*

THE material facts are stated in the opinion herein, filed on November 7, 1891.

*Calhoun & Garwood, D. H. Ettien, and W. R. Hazen, for the motion.*

*Morgan, Lowrance & Mason, contra.*

The opinion of the court was delivered by

VALENTINE, J.: This case was decided by this court on June 6, 1891. A motion for a rehearing was in due time filed and afterward presented to the court, and we shall now proceed to dispose of the same. It appears that some time in April, (about the 19th,) 1888, A. E. Guy was appointed by the judge of the district court in the supposed or intended case of Ott & Tewksbury et al. v. D. P. Doak, J. H. Allen, and A. P. Allen, et al., a receiver to take charge of the estate and property of said Allen & Allen. At that time, however,

## Opinion of the Court.

no such case had any existence. On May 9, 1888, the supposed receiver obtained leave of the judge of the district court to commence this present action of replevin against Doak and A. T. Irvin. On May 14, 1888, the intended action of Ott & Tewsbury against Doak, Allen, Allen, and others, and the present action of Guy, receiver, against Doak and Irvin, were commenced. On July 30, 1888, Doak and Irvin and others presented a motion to the judge of the district court to remove the receiver, Guy, in the aforesaid case of Ott & Tewsbury against Doak, Allen, Allen, and others, and this motion was duly heard and considered, and was overruled. On October 18, 1888, a trial was had in this replevin case before the court without a jury, and at the close of the plaintiff's (Guy's) evidence a demurrer thereto was interposed by the defendants, Doak and Irvin, and on October 20, 1888, the demurrer was sustained. Afterward evidence was introduced, and judgment was rendered in favor of the defendant Doak, and against the receiver, Guy, for a return of the property, or, in case a return could not be had, then for the value thereof, found to be \$4,977, and interest, \$145.15, and damages, \$737.33—total, \$5,859.48; and judgment was also rendered in favor of both the defendants, Doak and Irvin, against the plaintiff, Guy, for costs of suit. The journal entry of the district court showing these last-mentioned proceedings reads, so far as it is necessary to quote the same, as follows:

"And thereafter, on the 20th day of October, 1888, it being also one of the judicial days of said term of court, the court, after listening to the argument of counsel, and being fully advised in the premises, considers, orders, and adjudges, that said demurrer be sustained; to which ruling plaintiff excepted at the time, and the exception was allowed by the court. And thereupon, and upon said 20th day of October, 1888, the defendant D. P. Doak introduces testimony as to the value of the property taken, and as to damages to said defendant resulting from the taking and detention thereof by the plaintiff, and the plaintiff introduces testimony on the same matters. And after listening to the argument of the counsel, and being fully advised in the premises, the court finds for the defend-

## Guy v. Doak.

ants, D. P. Doak and A. T. Irvin, and against the plaintiff, and that defendant D. P. Doak is, and at the time of the commencement of this action was, the owner and entitled to the immediate possession of the property described in the affidavit for replevin for plaintiff, and for the property obtained by plaintiff under the order of delivery issued in said action; that plaintiff under said order of delivery, on the 16th day of May, 1888, obtained possession of the property enumerated in the following schedule, and that the value of said property at the time of its passing into the possession of plaintiff was as shown in said schedule, by the figures placed opposite each item of property. [Here follows schedule.]”

The certificate of the judge of the district court appended to the case-made and brought to this court also states that the case contains all the evidence “except evidence as to value of property given after the demurrer was sustained.” It also appears that this case was decided in the court below upon the theory that Guy had no possible interest in the property in controversy, and therefore that the defendants did not need to prove any interest in themselves, but only to prove the *value* of the property and *damages*, and this is probably all that they did prove. This we infer from the fact that no evidence is found in the record showing what their interest in the property was, except possibly that they were mortgagees thereof, with a possible mortgage claim against the property of about \$1,808; and no evidence is found in the record introduced by themselves showing that they had any right to the property or any right to the possession thereof. We infer from the foregoing that no evidence was introduced by the defendants at all nor by either party after the demurrer to the evidence was sustained, except evidence “as to the *value* of the property taken and as to *damages*.”

It is claimed by the defendants that Guy had no interest in the property when he commenced this action of replevin as receiver, for the reason that when he commenced the action he was not a receiver at all; and this for the reason that when he was appointed receiver the judge of the district court appointing him had no power or jurisdiction to make the appointment;

## Opinion of the Court.

and this for the reason that at that time no action was pending in which a receiver could be appointed. To this extent we think the decision of the district court extended, and to this extent we think its decision was correct, and this court so held in its former decision in this case. (Ante, p. 236.) But there is still another element involved in this case. When the defendants and others appeared before the judge of the district court, after the receiver was appointed and after this action was commenced, and before the trial therein was had, and moved the

1. Receiver—  
appointment  
before action  
brought.

judge to remove the receiver, which motion was overruled, we think such proceeding had the effect to make the receiver such from that time on, as between the parties. As giving some support to this proposition, we would refer to the cases relating to voluntary appearances. (*Cohen v. Trowbridge*, 6 Kas. 385; *Carver v. Shelly*, 17 id. 472.) But the decision of this proposition does not depend upon any voluntary appearance on the part of the defendants, or upon any waiver by them of previous irregularities; for at the time of their appearance, and at the time when they made the motion to remove the receiver, and at the time when their motion was overruled, the district court, or the judge thereof, had the unquestioned right and the power to appoint a receiver without appearance or waiver by them and without notice to them. (See former opinion in this case.) And by the order of the judge overruling their motion to remove the receiver the judge undoubtedly intended that the receiver should, from that time on, act as and be the receiver in the aforesaid case of *Ott & Tewksbury et al. v. Doak, Allen & Allen, et al.*, and be such receiver for the estate and property of the said Allen & Allen, which includes the property in controversy. And this action on the part of the judge, with his aforesaid intention, was equivalent to making a new appointment of Guy as receiver. The order overruling the motion to remove the receiver still stands unreversed and in full force. If the foregoing is correct, then Guy, from that time on, and at the time of the trial of this case, was receiver, and had some interest in the property in controversy. If, however, at the time of the trial, he had had no interest in

## Guy v. Doak.

the property, then the judgment of the court below giving the property or its full value to Doak would of course have been correct and could not be disturbed. (*Hall v. Jenness*, 6 Kas. 365, 366.) But as it was shown, as we now think, that Guy was receiver and did have some interest in the property at the time of the trial, it then devolved upon the defendants, Doak and Irvin, to show just what interest they had, for they had no right to recover from the plaintiff, Guy, who had the property in his possession and some interest therein more than their own special interest in the property.

It is a universal principle in replevin that where each of the parties has an interest in the property, and the party not having the possession thereof at the time of the trial recovers in the action, he should recover from the other party, as value, only the value of his own special interest in the property and not the actual value thereof. (*Wolfley v. Rising*, 12 Kas. 535; *Shahan v. Smith*, 38 id. 474; *Friend v. Green*, 43 id. 167.) In the present case we suppose that the defendants, Doak and Irvin, were mortgagees, and that the amount of their claim against the property was about \$1,808; while the judgment which they obtained was for a return of the property or the value thereof, \$4,977; and interest, \$145.15; and damages, \$737.33 — total, \$5,859.48. It may be that the defendants' interest in the property is much greater or much less than \$1,808, but it can hardly be said that they showed it to be greater. In fact, as we construe the record brought to this court, the defendants did not attempt to show their interest in the property, but simply showed, after the demurrer to the plaintiff's evidence was sustained, what the *value* of the property was, and what the *damages* were. Although the plaintiff failed to show that he had any right at the time of the commencement of the replevin action to commence the same, yet he showed that by subsequent proceedings he in fact obtained an interest in the property. It is admitted that the property belonged to Allen & Allen. And he showed that by the ratification on July 30, 1888, of his prior appointment as receiver of the Allens'

2. Replevin—  
measure of re-  
covery.

---

Opinion of the Court.

---

estate, in the case of Ott & Tewksbury *et al.* against Doak and the Allens and others, he obtained an interest in the property; and therefore, while the defendants had the right to defeat his action of replevin, because he commenced it when he had no right to do so, yet they had no right to a return of the property, or the value thereof, unless they showed that they had some interest therein. And in that event they could obtain a judgment as to the value thereof only for the *actual value of their own special interest therein*. This we think follows from §§ 184 and 185 of the civil code. Under § 184 of the civil code, they had the right to show that they had a right to the property, and a right to the possession thereof; and under § 185 they then had the right to obtain a judgment in the alternative for a return of the property to them, or for the value of their special interest therein in case a return of the property could not be had, and also damages.

We think that justice demands that this case should be returned to the district court for a new trial. There is nothing in the record that shows that the defendant Doak is entitled to any such enormous judgment as he obtained in the replevin action; and, as we construe the record, there could not have been any evidence introduced in the case that would entitle him to any such enormous judgment, and in all probability no such evidence was introduced, and he is not entitled to any such judgment; but if he is, he can show it on a subsequent trial.

We think the motion for the rehearing should be allowed, the judgment of the court below should be reversed, and the cause remanded for further proceedings, and it is so ordered.

All the Justices concurring.



W. H. HURD V. MARY H. SIMPSON *et al.*

**HUSBAND AND WIFE — Action — Misjoinder — Joint Judgment.** Where a husband and wife sell and convey jointly and by a joint deed certain real estate to H. for the joint consideration of \$5,650, and afterward the grantors commence a joint action against H. for the purchase-price of the land, and the petition states and shows a joint cause of action for the purchase-price of the land, and no question is raised as to a misjoinder of causes of action or of parties by either a demurrer or an answer, but on the trial it appears that each of the plaintiffs owned a separate portion of such real estate, and the trial court rendered a joint judgment in favor of the plaintiffs and against the defendant for the amount of the purchase-price still remaining due and unpaid, *held*, not error.

*Motion for Rehearing.*

THE material facts appear in the opinion, filed November 7, 1891.

*Geo. E. McMahon*, for the motion.

*Shepard, Grove & Shepard*, contra.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by Mary H. Simpson and R. J. Simpson, wife and husband, against W. H. Hurd, to recover the sum of \$5,650, claimed to be due to them as the purchase-price of certain real estate sold and conveyed by them to the defendant. The petition stated and showed a joint cause of action in favor of the plaintiffs and against the defendant for the purchase-price of the land. It appeared on the trial, however, that although the sale and conveyance was by a single deed executed by both the plaintiffs jointly, for a joint consideration of \$5,650, yet that each of the plaintiffs owned a separate portion of the real estate conveyed, and it is therefore now claimed that each had a separate cause of action, and that the two together did not have a joint cause of action, and therefore could not maintain this action for the purchase-price, nor for any portion thereof. This

## Opinion of the Court.

question, however, was not raised in the court below by either a demurrer or an answer, and hence, in our former decision in this case, (*ante*, p. 245; same case, 26 Pac. Rep. 465,) it was held that the question of misjoinder was waived, and that the plaintiffs might therefore recover in the action jointly for whatever might still remain due of the purchase-price of the land, which the court below found to be, principal and interest, \$2,240.57; and the court below rendered a joint judgment in favor of the plaintiffs and against the defendant for this amount.

Of course this court did not intend to hold in our former decision, and would not hold if the question were properly raised, that where each of two persons has a separate cause of action, such two persons together might maintain a joint action to enforce their separate causes of action. (*Hudson v. Comm'rs of Atchison Co.*, 12 Kas. 140; *Swenson v. Plow Co.*, 14 id. 387; *Palmer v. Waddell*, 26 id. 352; *Dobbs v. Stauffer*, 24 id. 127, 128; *Jeffers v. Forbes*, 28 id. 174; *McGrath v. City of Newton*, 29 id. 365; *City of Ellsworth v. Rossiter*, 45 id. 237.)

Separate causes of action in favor of separate individuals cannot, in the nature of things, constitute a single cause of action or a joint cause of action, or a cause of action in favor of any two or more or all of the several plaintiffs. But such causes of action are nevertheless causes of action in favor of the separate plaintiffs, and are not nullities. Nor would this court hold that a misjoinder of parties or an excess of parties would constitute a defect of parties. (*McKee v. Eaton*, 26 Kas. 226.) Nor would this court hold that a demurrer would lie in any case for a misjoinder of parties. (Civil Code, § 89; *Town Co. v. Maris*, 11 Kas. 147.) But this court intended to hold by our former decision in this case, and now holds, that under the facts of this case and the provisions of the civil code the defendant below, plaintiff in error, so waived any question of misjoinder which might possibly be in the case that the court below did not err as against the defendant in rendering a joint judgment, as it did upon the facts of the case, in favor of the plaintiffs and

Husband and  
wife—action—  
misjoinder—  
joint judgment.

against the defendant for the amount of the purchase-price of the land still remaining due; and therefore this court now holds that the motion for a rehearing in this case should be overruled. Under § 35, article 4, of the civil code, "all persons having an interest in the subject-matter of the action and in obtaining the relief demanded *may be joined* as plaintiffs, except as otherwise provided in this article;" and § 37 of the same article provides as follows:

"SEC. 37. Of the parties to the action, those who are united in interest *must be joined*, as plaintiffs or defendants; but if the consent of one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason being stated in the petition."

And under § 83, article 7, of the civil code, "the plaintiffs *may unite several causes of action* in the same petition;" but, in order that they may do so, these "*causes of action*" must all belong to one of the several classes of actions mentioned in said section, "*and must affect all the parties to the action*, except in actions to enforce mortgages or other liens." Now, where each of two plaintiffs has a separate cause of action, the separate cause of action of one of the plaintiffs would certainly not in any manner *affect* the other plaintiff; hence, under said § 83 of the civil code, such two separate "*causes of action*" could not be united in one and the same action. But if they should be so united, then there would be an improper joinder of causes of action. (*Jeffers v. Forbes*, 28 Kas. 174.) And the question whether they could be so united or not might properly be raised by a demurrer to the petition, where the facts showing the same appear upon the face of the petition. (Civil Code, § 89, subdiv. 5; *Jeffers v. Forbes*, 28 Kas. 177; *Barnes v. City of Beloit*, 19 Wis. 93; *Newcomb v. Horton*, 18 id. 566. Also, in the same connection, see *Fuller v. Fuller*, 5 Hun, 595; *Fisher v. Hall*, 41 N. Y. 416.) In the opinion of the court in case of *Jeffers v. Forbes*, supra, delivered by Mr. Justice BREWER, the following, among other language, is used:

"The first ground of demurrer, as heretofore stated, is, that several causes of action were improperly joined; and the con-

## Opinion of the Court.

tention is, that the setting aside of each of the six several deeds from the plaintiffs to the defendant, W. H. Forbes, was a separate and independent cause of action, in which only the grantor in such deed had any interest. . . . We think the contention of the defendants in error is correct, and that the ruling of the district court must be sustained on this ground. [Such ruling of the district court was, that the demurrer should be sustained.] . . . As each grantor is alone interested in obtaining the cancellation of his own deed, and as all the other plaintiffs would be improper parties in an action brought by the one alone to set aside his individual deed, so where all the parties unite in an action to have set aside six several deeds by separate grantors conveying separate interests, they unite six several causes of action in one suit, and six several causes of action in each of which only a portion of the plaintiffs is interested. . . . We conclude, then, that upon this ground the ruling of the district court is correct, and must be affirmed. We might stop here, but inasmuch as under § 92 of the civil code the court, upon the application of the plaintiffs, must allow them to file separate petitions for the different causes of action, it is due to the parties that we should examine further, and determine whether the second ground of demurrer, namely, that the petition does not state facts enough to constitute a cause of action, is sustainable."

In the case of *Barnes v. City of Beloit*, supra, the supreme court of Wisconsin, in holding that a demurrer to the complaint upon the ground that several causes of action were improperly joined would lie, used the following, among other language:

"But the complaint in the action sets forth separate causes of action, one in favor of each plaintiff, without being separately stated; and if so, several causes of action are improperly united. The counsel for the respondents, however, maintains that different causes of action, within the meaning of § 5, ch. 125, R. S., are improperly united only where there are in the same complaint causes of action of the different classes mentioned in § 29 of the same chapter; as, for instance, where the complaint contains one count in tort and another on contract; and that where there are several causes of action, to wit, one in favor of each of several plaintiffs, in the same complaint, and all of the same class, the remedy is not by demurrer, but by motion. He cites several cases to this point, but they are all cases where

---

Hurd v. Simpson.

---

several causes of action in favor of all the plaintiffs, *affecting all the parties*, and which *might be united* in the same complaint, were not separately stated. But in this case each separate cause of action does not affect *all the parties* to the action, and they could not be united without violating the provisions of § 29, aforesaid. In other words, the plaintiffs have no common pecuniary interest. The complaint would have been held bad before the code for multifariousness."

In the case of *Fuller v. Fuller*, *supra*, the following was decided:

"Where, upon the trial of an action brought by two plaintiffs to recover for the conversion of a team of oxen, it appeared that each of the plaintiffs owned one of the oxen, *held*, that a motion for a nonsuit of both of the plaintiffs, on the ground that they had brought a joint action and shown a several interest, was properly denied." (Syllabus.)

In the case just cited, the case of *Simar v. Canaday*, 53 N. Y. 298, is referred to, which decides as follows:

"A misjoinder of parties plaintiff is not a ground for dismissal of the complaint as to all the plaintiffs, if either has shown that he has a good cause of action. In such case the motion must be for dismissal of the complaint of the plaintiff in whom no right of action appears." (Syllabus.)

In the case of *Fisher v. Hall*, *supra*, the plaintiffs were the children and their husbands and the grandchildren of George Fisher. Their action was for the recovery of certain undivided interests in real property, and they brought their action as devisees under the last will and testament of Leonard Fisher, the father of George, by which will Leonard devised to George the property in question, with other property, in trust for the use of George's children and their heirs. The plaintiffs were only a portion of the tenants in common of the real estate in controversy, and not all of such tenants in common, and the case was decided upon the theory that such an action could be rightfully maintained only by each tenant in common separately, or by all the tenants in common jointly, and not by simply a portion of the tenants in common. A judgment, however, in favor of the plaintiffs, who were only a portion

## Opinion of the Court.

of the tenants in common, was affirmed upon the grounds stated in the following language contained in the opinion of the court, to wit:

"As tenants in common, representing less than the aggregate common interests in the estate, the plaintiffs probably would have been unable to have maintained a joint action, if that objection had been taken in time. . . . But as the facts of the case were fully stated in the complaint, showing that the plaintiffs did not represent all the common interests in the estate, if any objection was intended to be taken to their right to maintain the action on the account, it should have been presented at that time. By answering and taking issue on the case alleged, *this objection was waived*, and it became the duty of the court to try and determine the issue as it had been joined by the pleadings. *If any objection existed to the form in which the action was brought, it was that the complaint contained several causes of action which had been improperly united, and that should have been raised by demurrer. As it was not, it was waived, within the express language of section 148 of the code.* The judgment should be affirmed with costs."

The above § 148 of the New York code, together with § 147 of that code, corresponds precisely with § 91 of the Kansas code, hereafter quoted.

We know of no decision by any court of last resort adverse to any of the foregoing cases. There is a *dictum*, however, in the case of *Masters v. Freeman*, 17 Ohio St. 323, which comes near it. The case of *Bort v. Yaw*, 46 Iowa, 323, which is supposed to be strongly against the above views, has no application whatever to this case, for the reason that under the statutes of Iowa a demurrer will not lie on the ground of a misjoinder or improper joinder of causes of action; nor can a defendant ever waive anything under the statutes in that state by merely failing to file such a demurrer and failing to raise the question specifically by answer. The contention on the part of the defendant below would seem to be substantially, that where two or more persons commence an action jointly, they must allege and prove a joint cause of action in favor of all the plaintiffs, or all must utterly fail in their action; or, in other words, their contention is as follows: Where two or more persons

---

Hurd v. Simpson.

---

sue jointly for anything, as for the purchase-price of land, and upon the trial it appears that each is entitled to a part, or that one or more of the number and not all is entitled to a part or the whole and the others not entitled to anything, then that the action must fail as to each and all, upon the principle that a cause of action in favor of each or any one or more of the plaintiffs less than all is not a cause of action in favor of all. This would certainly be a harsh rule, especially in the light of § 396 of the civil code, which provides among other things that "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants." It is certainly not the law that where two or more sue jointly all must recover jointly or all utterly fail. Mr. Pomeroy, in his work on Remedies and Remedial Rights under the Code Practice, § 41, after first speaking of the equitable theory of judgments, then uses the following language:

"The common-law theory of the judgment was in every respect different from this. Based upon the intensely arbitrary notion of joint rights and obligations, it regarded the demand of co-plaintiffs on the one side, and the liability of co-defendants on the other, except in a certain well-defined class of cases, as a unit, as utterly incapable of being severed, as something which must be established as to all or must fail as to all the parties. In no instance was affirmative relief granted to the defendant. Recoveries by plaintiff against plaintiff, or by defendant against defendant, were unknown. Since the right of the plaintiffs or the liability of the defendants was conceived of as one and indivisible, the recovery must be against all the defendants equally, and in favor of all the plaintiffs alike. As a general rule, therefore, independent of statute and of the few excepted cases, the judgment in a common-law action could not be severed, and be pronounced in favor of some plaintiffs and against the others, nor in favor of some defendants and against the others. No principle of the common-law procedure was more firmly established than this; and it represented all the technical and arbitrary notions which characterize the entire system. The codes are unanimous in their dealing with this subject. In the most direct and comprehensive language they reject these narrow dogmas

---

Opinion of the Court.

---

of the law, and establish the liberal doctrines of equity, which they apply to the civil action without exception or limitation. The statutory provisions are so clear, definite and certain that no reasonable doubt as to their scope and meaning is possible. Although the purpose of the law-makers and the theory of their legislation are so plainly expressed, the courts have hesitated and halted in giving effect to this extent and in carrying out this design. The change made in the ancient order of things is so radical and sweeping that judges sometimes shrink from its contemplation, and seem to regard the statute as though it could not mean what its language declares. This evasion or ignoring of the legislative will has by no means been universal. In many states the courts have conformed to the letter and the spirit of the codes, and have by their decisions established the true principles which can and must be adopted and used in constructing and arranging the practical rules of procedure that regulate the recovery of judgments by means of the civil action."

There are cases in some of the states where they have no code like ours, or where the code is ignored and the common-law rules followed, in which it is held that the several plaintiffs in an action must all recover jointly or all utterly fail; and following this doctrine it is further held, that it makes no difference how many causes of action may be stated in the plaintiffs' original pleading in favor of one or more of the plaintiffs; still if no joint cause of action is stated in favor of all the plaintiffs, the pleading may be demurred to upon the ground that no cause of action at all is stated in the pleading. Such can hardly be the law, however, in any state like this, where all the distinctions between actions at law and suits in equity and all the forms of all such actions and suits are abolished, and where we have in their place only one form of action, which is called a civil action, (Civil Code, § 10,) and where "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants." (Civil Code, § 396.) It would seem strange that a petition may contain several causes of action and yet not contain one. The petition, however, in the present case contains only one cause of action, and that is a joint



---

Hurd v. Simpson.

---

cause of action in favor of both the plaintiffs and against the defendant. Where a petition, however, of several plaintiffs, which sets forth several causes of action, one in favor of each of two or more of the plaintiffs, but none in favor of all the plaintiffs, which is not the present case, such petition may be demurred to upon the ground of an improper joinder of causes of actions. (See the authorities above cited.) The argument is this: Section 83 of the civil code provides for the joinder of causes of actions, but provides that causes of action can be joined only where they all "*affect all the parties to the action, except in actions to enforce mortgages or other liens.*" If the *causes of action* attempted to be joined *do not affect* all the parties, within the requirements of § 83, then there is an improper joinder of causes of action, and § 89 of the civil code provides that a demurrer will lie to a petition where "several causes of action are improperly joined;" (subdiv. 5;) and § 91 of the civil code then provides as follows:

"SEC. 91. When any of the defects enumerated in section 89 do not appear upon the face of the petition, the objection may be taken by answer; and if no objection be taken, either by demurrer or answer, the defendants shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action."

Where a separate cause of action in favor of each of the several plaintiffs is stated in the petition, so as to subject the petition to a demurrer upon the ground that several causes of action are improperly joined, and where a demurrer upon such ground is interposed and sustained, then the proper practice is as follows: Each of the plaintiffs will be permitted, upon application, to file a separate petition for his or her own cause of action, and each of such plaintiffs will then be permitted to separately proceed upon his or her own separate petition. (Civil Code, § 92; *Jeffers v. Forbes*, 28 Kas. 180.) In all probability, however, each of the plaintiffs in the present case had an interest in the entire amount of the purchase-price of their land, and if the question of their interests, whether joint or several,

had been properly raised, it would probably have been shown and found that their interests were joint. But what if they were not joint? What harm could the defendant suffer by paying to the plaintiffs jointly just what he owed to them in severalty? He could lose nothing by such a transaction. But he did not need to litigate with them jointly if their claims were really separate, unless he chose to do so. In all cases a defendant may raise the question of the misjoinder of the separate causes of action of several plaintiffs, either by demurrer or answer, and have such separate causes of action separated and litigated separately. But if a defendant chooses to permit such separate causes of action to be litigated together, he should not complain of a joint judgment against him, where there can be no complaint against it except that it is joint. As to the judgment, see *Hall v. Jenness*, 6 Kas. 365. It might be doubtful, however, in this case, even if the plaintiffs were entitled to separate portions of the purchase-price of their land, and not entitled to the same jointly, and even if the question of misjoinder had been properly raised by the defendant, whether he could have defeated the plaintiffs' joint action. Section 28 of the civil code provides that "a person with whom or in whose name a contract is made for the benefit of another . . . may bring an action without joining with him the person for whose benefit it is prosecuted." In this case the contract was made with both the plaintiffs jointly; it was made in their names jointly, and upon its face it was for their benefit jointly. But suppose that it was really for their benefit severally: then may they not, as the contract was made with them jointly and in their joint names, bring the action in their joint names for the benefit of themselves severally? See what is said in *Walburn v. Chenault*, 43 Kas. 352, 358.

Upon the facts of this case, and with our views of the law, it is the opinion of this court that the judgment of the court below should be affirmed, and that the motion for the rehearing should be overruled, and it is so ordered.

All the Justices concurring.

---

*In re Rabbitt, Petitioner.*

---

*In the matter of the Petition of MIKE RABBITT, for a Writ of Habeas Corpus.*

CASE, *Followed.* The principles enunciated and decided in *In re Short, Petitioner*, ante, p. 250, control the decision in this case.

*Original Proceeding in Habeas Corpus.*

THE opinion herein, filed November 7, 1891, states the material facts.

T. A. Pollock, for petitioner.

Henry McGrew, county attorney, and Morse, King & Morse, for respondent.

*Per Curiam:* This is an application in this court for a writ of *habeas corpus* on the part of Mike Rabbitt, who claims that he is unlawfully restrained of his liberty in pursuance of a judgment rendered by a justice of the peace of Kansas City, Kas., sentencing him to imprisonment in the county jail of Wyandotte county for the period of three months for the offense of unlawfully carrying a deadly weapon. The only ground upon which it is claimed that the imprisonment is unlawful is that there is no such city or township as that of Kansas City, Kas., and this for the reason that the statute under which the city was organized is unconstitutional and void, and therefore it is claimed that there can be no such officer as justice of the peace of such city or township, and therefore that the judgment or sentence under which the applicant is restrained of his liberty is absolutely void. We think the principles enunciated and decided in the two cases of *In re Short* and *In re Cross*, ante., p. 250, will control the decision in this case. See also the authorities therein cited. Kansas City is a city and township *de facto*, if not *de jure*. It is now acting under valid statutes and valid laws—acts relating to cities of the first class—and the question of its

Guthrie v. Anderson.

legal organization or legal existence cannot be raised in this manner.

The application for the writ of *habeas corpus* will be denied.

*Per Curiam:* The case of *In re JAMES WILLIAMS, Petitioner*, is decided adversely to the petitioner upon the foregoing authority of *In re Rabbitt*.

### W. W. GUTHRIE v. NICHOLAS ANDERSON.

1. **FRAUDS, Statute of.** Section 6 of the act for the prevention of frauds and perjuries provides that "no action shall be brought whereby to charge a party . . . upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized."
2. **WRITTEN MEMORANDUM, Not Enforced.** If the owner of land signs a writing or memorandum, wholly executory, agreeing to convey the land therein named to W., who does not sign by himself or agent, and W. does not take possession of the land, or in any other way make part performance, W. cannot be charged in an action upon the writing or memorandum which he has not signed.
3. **PART PERFORMANCE, Insufficient.** The mere payment of a small part of the purchase-money by an alleged purchaser to the owner thereof is not a sufficient part performance to take the case out of the statute of frauds.
4. **ALLEGED PURCHASER, Not Charged.** Although a written memorandum concerning the sale of real estate, signed by the owners thereof, is wholly in the handwriting of an alleged purchaser, and his name is introduced in the body of the instrument as one of the terms or a part thereof, yet if he nowhere signs the same by himself or agent, the memorandum is not sufficient to satisfy the statute of frauds, so that he can be charged thereby.

#### *Error from Atchison District Court.*

On the 10th day of July, 1888, *Nicholas Anderson* brought his action against *W. W. Guthrie*, to recover \$1,800, with in-

47	383
48	505
47	383
49	419
47	383
62	47
47	383
68	121
47	383
75	18

---

Guthrie v. Anderson.

---

terest thereon from the 3d day of June, 1888, for a balance of purchase-money upon the following written memorandum:

"The undersigned, husband and wife, owners in fee-simple, with title perfect and all taxes paid up to and including 1887, of lot 8, in block 39, old Atchison, city of Atchison, Kas., hereby bargain to sell the same to W. W. Guthrie at and for the price of \$2,000, \$200 cash in hand paid, and the other \$1,800 to be paid three months from date, upon surrender of possession of said property in condition now existing and the furnishing of an abstract of title showing said property to be free and clear from all incumbrance and title perfect, and thereon to execute and deliver deed of general warranty, with usual covenants, to said W. W. Guthrie, his heirs, or assigns.

Dated Atchison, Kas., March 3, 1888.

N. ANDERSON,  
SOPHIE ANDERSON."

Indorsed on back: "Nick Anderson and wife, lot 8, bk. 39, to W. W. Guthrie."

Trial had before the court with a jury, at the September term, 1888. Verdict for plaintiff for \$1,852.50. The defendant filed his motion for a new trial, which was overruled. Judgment was entered upon the verdict in favor of the plaintiff and against the defendant. The defendant excepted, and brings the case here.

*W. W. & W. F. Guthrie*, for plaintiff in error.

*Henry Elliston*, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: The principal question for determination in this case is whether W. W. Guthrie, the alleged purchaser of the land or lot described in the petition, can be compelled to pay the balance claimed to be due upon the written memorandum, dated March 3, 1888, and signed, "N. Anderson" and "Sophie Anderson." It appears from the evidence that Mr. Guthrie prepared, or caused to be prepared, the memorandum. It is an executory agreement upon the part of Anderson and wife, and not a completed contract, like a deed executed and delivered. It concerns the sale of land, and is

## Opinion of the Court.

not signed by Mr. Guthrie, but by Anderson and wife only, the owners of the lot. Soon after the signing, Guthrie paid the Andersons \$200, but has never taken possession of the lot, or accepted any deed. When the Andersons were ready to tender the deed he refused the same, and also refused to take possession of the lot. Section 6 of the act for the pre-

1. Frauds, statute of.

vention of frauds and perjuries provides that no action shall be brought to charge any person upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her authorized. The agreement or memorandum referred to in the petition, although in writing, is not signed by the party *sought to be charged in this action*. The objection that the action cannot be maintained upon the writing or memorandum against Mr. Guthrie is, therefore,

2. Written memorandum, not enforced.

well taken. To hold a party, in an action upon any writing or memorandum for the sale of land, or concerning the sale of land, he must have signed or authorized the same to be signed. The party charged in the action is the one who must have signed. It was said by this court, in *Becker v. Mason*, 30 Kas. 701, referring to contracts or memorandums for the sale of or concerning lands, that—

“It will be seen that the statute does not attempt to make parol contracts concerning real estate void, but simply provides in substance that no party shall be ‘charged’ upon them, unless the contract, or some note or memorandum thereof, has been reduced to writing ‘and signed by the party to be charged.’ The statute merely relates to the proof of the contract—providing in substance that the contract must be proved, if proved at all, by some written note or memorandum of the contract, signed by the party to be charged, which party is generally the defendant in the action. . . . The contract necessarily embraces two parties, each contracting with reference to the real estate—either of whom may be charged upon the contract, if the contract or some note or memorandum thereof is reduced to writing and signed by such party.”

---

Guthrie v. Anderson.

---

*Ross v. Allen*, 45 Kas. 231, was an action for specific performance against Ross, brought by Allen to compel him to pay the purchase-price of certain lots which it was alleged had been bought by him, and \$100 paid thereon. In that case, the receipt or memorandum was signed by J. M. Allen, agent. Allen was in fact the agent for his wife, Mrs. Allen, the owner of the lots. Judgment was rendered in the district court in favor of Allen and against Ross, decreeing a specific performance of the contract, and requiring Ross to pay the balance of the purchase-price of the lots. This court reversed the judgment for various reasons, among others, that "the memorandum is not signed by Ross, nor by anyone for him, and the omission of this essential is of itself sufficient to defeat the maintenance of the action." If the Andersons desired that Mr. Guthrie should be charged by the writing or memorandum, they should have required him or his agent to have signed the same. The Andersons, who signed the writing or memorandum, are bound thereby, and could not set up the statute in bar. Mr. Guthrie is not bound, because neither he nor his agent signed, and therefore he can plead the statute. At one time it was a serious question whether the courts would specifically execute a writing or memorandum concerning lands, where one party only was bound, that is, where only one party had signed. It was held by some of the courts that in such a case, the writing or memorandum not being mutually binding, one party ought not to be at liberty to enforce at his pleasure an agreement which the other was not entitled to claim. But the authorities now agree that where an action is brought upon a writing or memorandum for or concerning the sale of land, if the party sought to be charged in the action signed the same by himself or agent, he is liable thereon, and he cannot successfully plead as a defense that the plaintiff has not signed. To the party sought to be charged, who has signed, the statute is no defense. (*Hawkins v. Holmes*, 1 P. Wms. 770; *Clason v. Bailey*, 14 Johns. 484-489; *Justice v. Lang*, 42 N. Y. 493; *Fry*, Spec. Perf., § 497; *Waterman*, Spec. Perf., § 239;

*Rogers v. Saunders*, 16 Me. 92; *Sams v. Fripp*, 10 Rich. Eq. 447.)

In several of the states, like Wisconsin, the statute differs from ours. In Wisconsin, and some other states, the contract is required to be subscribed by the party by whom the sale is made. Therefore the decisions in Wisconsin and the states where the statute differs from ours are not applicable. Several decisions are cited by the counsel for plaintiff below, to the effect that a parol agreement by the vendee of land to pay the purchase-price or consideration mentioned in the deed is binding although not in writing. The case of *Nutting v. Dickinson*, 8 Allen, 542, is one of those. In that case the defendant accepted the deed, thereby obtaining full title to the premises conveyed, and the contract was wholly executed upon the part of the plaintiff, who sought to recover the consideration of the deed. In such a case, the promise of the vendee is not within the statute.

"The acceptance of the deed makes it a contract in writing binding upon the grantee, just as the acceptance by a lessee of a lease in writing, signed only by the lessor, makes it a written contract binding upon such lessee; and a suit can be instituted on it, and the same rights be maintained as though it were also signed by the grantee." (*Schumaker v. Sibert*, 18 Kas. 104; *Wood*, *Frauds*, §§ 222, 223; *Worrall v. Munn*, 5 N. Y. 229; *Wilkinson v. Scott*, 17 Mass. 249; *Davenport v. Mason*, 15 id. 85.)

Where a deed or lease is executed and delivered, the seller or lessor has fully completed his part of the contract, and the purchaser or lessee has not only the written deed or lease in his possession, but also has possession or right of possession of the land deeded or leased. (See, also, *Aiken v. Nogle*, ante, p. 96.) In *Gartrell v. Stafford*, 12 Neb. 545, the action was by the vendee against the vendor for a specific performance of an alleged contract for the conveyance of real estate. The vendor, Mrs. Stafford, had signed certain letters agreeing to sell. Therefore, in that case, as has been frequently decided in other cases, she was bound, because she had signed the let-



Guthrie v. Anderson.

ters or agreement and was the party to be charged. The court in that case, however, did not decide that where the vendee does not sign the writing or memorandum the vendor can enforce the writing or agreement which he has signed. The authorities are also to the effect that, where possession is taken or other part performance had by the purchaser or vendee, such acts may take the case out of the operation of the statutes. But this case does not come within that class. The mere payment of \$200 by Mr. Guthrie to the owners of the

3. Part performance,  
insufficient.

lot described in the petition is not part performance. His refusal to complete the contract after paying part of the purchase-money is no fraud upon the sellers, but his loss. (Fry, Spec. Perf., § 567.)

Upon the trial, the court charged the jury that—

“A contract for the conveyance of real estate is not binding and valid unless the same is reduced to writing or some memorandum thereof, and signed by the parties to be charged therewith. The signing of the contract, however, need not be at the end of the contract, and it need not be formal. It may be at the beginning or in the body of the contract by one party, and signed at the end by the other. Such a contract, if the insertion of the name at the beginning or in the middle or any part of the contract is intended by the party or parties as the signature of said party, then said contract would be as binding as if the signature had been made at the end of said contract, if such signing is done in a manner and under such circumstances as to authenticate the contract as the contract of such parties so signing. And in this case, if the said Guthrie so inserted his name or caused the same to be inserted in the body of the contract with the intention of binding himself thereby, and intended to be as a signature, or intending to lead the plaintiff to believe that he was bound thereby, in either case the contract would be in compliance with the statute of frauds, and would be a contract in writing signed by the party to be charged therewith. You are further charged that, if in this case you find that the defendant, W. W. Guthrie, prepared the contract, or caused the same to be prepared upon a type-writer, and caused his name to be written therein as a party to said contract, this will operate precisely the same

## Opinion of the Court.

as if he had written the contract himself and written his own name therein."

The jury, among others, made the following special findings of fact:

"Ques. 10. Was any agreement, memorandum or note in writing of the contract, upon which plaintiff claims in this action, signed, other than by the plaintiff and his wife? Ans. Yes.

"Q. 11. If No. 10 is answered in the affirmative, then state where such signing is found to have been done and by whom and on what account? A. Such signing is found in the body of the contract, by direction of said Guthrie."

The portions of the charge of the court referred to are inapplicable to the evidence introduced, and the foregoing special findings of the jury are unsupported by the evidence. The writing or memorandum was prepared, or caused to be prepared, by Mr. Guthrie, and his name appears in the body of the instrument as the party to whom the Andersons agreed to sell. But this is not equivalent to the instrument being signed by Mr. Guthrie. The rule is stated in Wood on Frauds, § 22, p. 61, as follows:

"In all cases, the signature must be such as amounts to an acknowledgment by the party that the agreement is his; consequently, if it is not signed by him or his agent, authorized as provided by the statute, although it is wholly in his handwriting, and his name appears in the body of the instrument, it is not sufficient to satisfy the statute."

4. Alleged purchaser, not charged.

Waterman on Specific Performance says that "when the name of the party is introduced in the body of the instrument as one of the terms of the agreement—as, in the memorandum for a lease, in the words, 'the rent to be paid to A.,' it does not amount to a signature by A."

In the case of *Caton v. Caton*, L. R., 2 H. L. 127, Lord Westbury says: "If a signature be found in an instrument incidentally only, or having relation and reference only to a portion of the instrument, the signature cannot have that legal effect and force which it must have in order to comply with

---

Guthrie v. Anderson.

---

the statute, and to give authenticity to the whole of the memorandum." (See, also, Fry, Spec. Perf., §§ 503-506; *Stokes v. Moore*, 1 Cox, 219; *Hawkins v. Holmes*, 1 P. Wms. 770.) If Mr. Guthrie had signed his name at the bottom or the top or anywhere upon the memorandum after it had been written or prepared, or directed his name to be so written for acknowledgment, then it might be held that such a signature would satisfy the statute. But his name only appears (except as hereinafter referred to) in the body of the instrument as one of the terms or a part thereof; therefore the charge of the court was not only misleading but prejudicial, and the findings of the jury based thereon cannot be sustained.

Finally, it is claimed that Mr. Guthrie signed the memorandum, because in paying the \$200 he gave his agent, Mr. Storch, a check which reads as follows:

"ATCHISON, KAS. March 3, 1888.

"\$200.

No. 17.

"United States National Bank.—Pay to Geo. Storch or order two hundred dollars.

[Signed] W. W. GUTHRIE."

Written across face: "Lot 8, block 39, O. A."

This was indorsed on the back by Geo. Storch, and delivered to the Andersons. The Andersons collected the \$200—the amount of the check. Mr. Storch was the president of the bank upon which the check was drawn. He was acting for Mr. Guthrie, and the check was payable to his order, not to the order of the Andersons. It was not a writing or memorandum to be kept or retained by the Andersons or by Storch, the payee, but it was an order or check upon Mr. Guthrie's deposit in the United States National Bank, returnable to him in the usual course of banking business, after it had been paid, when he should settle with the bank concerning his account therein. Mr. Guthrie testified about this check, as follows:

"This memorandum of 'lot 8, block 39, O. A.,' [upon the check] I put there for the purpose of identifying it; this was another party's matter, and I had drawn the check for \$200 because Mr. Parker was not in the city, and to identify what it was for I put this on the face of it, and that is the reason

why it was put there; neither of the indorsements was put there for any other purpose than as a memorandum to identify the paper in any further use of it."

The signing of the check, with the words and figures "lot 8, block 39, O. A.," written across the face thereof, was not the signing of the memorandum executed by the Andersons. The words and figures seem merely to have been used to indicate to Mr. Guthrie the purpose for which he gave the check. The indorsement on the back of the written memorandum of March 3, 1888, by Mr. Guthrie was after the same had been delivered to him, and was put thereon by him when placing it among his papers or files as marks of identification—not as an acknowledgment, or as any authentication.

The judgment of the district court must be reversed, and the cause remanded.

All the Justices concurring.

47	391
67	499

47	391
74	446

PETER OLSON V. A. G. NUNNALLY, *as Constable of Center Township, Jewell County, et al.*

1. **JUDGMENT—No Legal Existence.** Under the allegations of the pleadings, it is assumed by the supreme court that a certain judgment of a justice of the peace was rendered on April 30, 1887, and set aside and a new trial granted on May 4, 1887, and the new trial was set for May 16, 1887; and upon these facts, *held*, that after May 4, 1887, the judgment of the justice of the peace had no legal existence.
2. **JUSTICE OF THE PEACE—Jurisdiction.** On May 16, 1887, the parties appeared, but the justice of the peace was absent from his office and from the township, and nothing was then done in the case. *Held*, That the justice of the peace thereby lost all jurisdiction of the case.
3. **DEFUNCT JUDGMENT, Not Revived.** Afterward, and on November 3, 1887, the justice of the peace attempted by an order to set aside and vacate his previous order setting aside and vacating the judgment and granting a new trial; but *held*, that the order of November 3, 1887, could not have the effect to revive or resuscitate the former defunct judgment.

---

Olson v. Nunnally.

---

4. **VOID EXECUTION — Collateral Attack.** Afterward an execution was issued upon the judgment and levied upon the defendant's property; but *held*, that as the judgment had no legal existence the execution was itself void, and could be attacked collaterally as well as directly, and its enforcement be restrained by injunction.
5. ——— *No Estoppel.* The defendant in the execution gave a redelivery bond and was thereby permitted to retain the possession of the property; but *held*, that by giving such redelivery bond he did not estop himself from afterward asserting, either directly or collaterally, that the judgment and all things depending upon it were absolutely void.

*Error from Jewell District Court.*

THE material facts appear in the opinion.

*J. H. Mechem*, for plaintiff in error.

*T. S. Kirkpatrick*, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought in the district court of Jewell county on December 13, 1887, by Peter Olson against N. Lindgrove and A. G. Nunnally, to perpetually enjoin the defendants from making a sale of certain personal property belonging to Olson and levied on by the defendant Nunnally as constable of Center township, in said county, under an execution issued by J. W. McRoberts, a justice of the peace of said township, upon a supposed judgment in favor of Lindgrove, as the judgment creditor, and against Olson, as the judgment debtor. The plaintiff, Olson, in his petition in the district court, sets forth and alleges that the judgment upon which the execution was issued was rendered on April 30, 1887, and he attaches a certified transcript of the judgment and the proceedings of the justice of the peace to his petition, and makes them a part thereof. This transcript shows that the trial before the justice was had on April 28, 1887, and then follow these words: "After hearing arguments of counsel and taking the matter under consideration until April 30, 1887;" and then follows the justice's judgment, which is entered without any further date being given.

---

Opinion of the Court.

---

Olson further alleges in his petition, and shows by the transcript, that on May 4, 1887, such judgment was set aside and vacated and a new trial granted, upon a motion made by himself for that purpose, upon the ground of newly-discovered evidence, and the new trial was set for May 16, 1887. But it is also alleged that on that day the parties appeared, but the justice of the peace was absent from his office and from the township, and nothing further was done in the case. The transcript also shows that on November 3, 1887, the justice of the peace attempted to set aside and vacate his previous order setting aside and vacating the aforesaid judgment and granting a new trial, for the reason that the aforesaid motion of Olson's to vacate the judgment and for a new trial was not "in writing as agreed upon." Upon this subject Olson alleges in his petition that it was agreed by the parties at the time that the motion might be made orally. Whether Olson or his counsel was present or not, or had any notice when this last order of the justice was made attempting to set aside his former order vacating the judgment and granting a new trial, the transcript is silent. Other allegations are contained in the petition, not necessary to be stated for the purposes of any question now presented to this court. This petition was duly verified by affidavit. The defendants answered, setting up the aforesaid judgment, execution, and levy, and also that the defendant gave a redelivery bond, on account of which he was permitted to retain the possession of the property levied on. The defendants also allege in their answer that the aforesaid judgment was rendered on April 28, 1887, and that Olson did not make any motion for a new trial within five days thereafter; and they attach a certified transcript of the judgment and proceedings of the justice of the peace to their answer, and make the same a part thereof. This transcript shows precisely the same as the one attached to the plaintiff's petition, except that it does not contain the words "after hearing arguments of counsel and taking the matter under consideration until April 30, 1887." The plaintiff replied to this answer by filing a general denial. Neither the answer nor

the reply was verified by affidavit. At the June term of the district court, in 1888, the defendants made and presented a motion for judgment upon the pleadings, which motion was sustained, and judgment was rendered in favor of the defendants and against the plaintiff for costs; and the plaintiff, as plaintiff in error, brings the case to this court for review.

It would seem to us that the judgment of the district court is erroneous and must be reversed. For the purposes of the case it must be assumed, either that the judgment of the justice of the peace was rendered on April 30, 1887, or that there was an issue of fact presented by the pleadings of the parties as to whether it was rendered on that day or on April 28, 1887; and as the plaintiff, Olson, in his petition alleged, and his transcript showed, that the judgment was rendered on April 30, 1887, he certainly had a right, either to have this allegation to be considered as true, or the right to prove the same by evidence; provided, of course, that the same shall be considered as material in the case and as controverted by the defendants. We shall therefore assume for the purposes of this case that the judgment was rendered on April 30, 1887. We shall also assume for the purposes of this case, that in any case a motion to vacate or set aside a decision or verdict rendered in a justice's court and for a new trial must be made within five days after the decision or verdict is rendered; (Justices' Code, § 110;) and that the motion should be in writing, but that the parties and the justice may waive the writing, and permit the motion to be made orally; and with these assumptions, the following questions arise: Was the judgment of the justice of the peace a valid and subsisting judgment at the time when the execution in question in this case was levied on Olson's property? And did he, by giving the redelivery bond, estop himself from questioning its validity? The judgment, if rendered on April 30, 1887, as alleged by the plaintiff and shown by his transcript, was certainly vacated and set aside on May 4, 1887, and therefore at that time it ceased to have any legal existence. The action, however, was still pending before the justice of the peace, and the case was set for a second trial on May 16, 1887;

## Opinion of the Court.

but on that day the justice of the peace was absent from his office and from the township, and nothing was done in the case, and therefore, under the authorities, the justice lost all jurisdiction of the case. (*Martin v. Fales*, 18 Me. 23; *Flint v. Gault*, 15 Hun, 213; *Lynsky v. Pendegrast*, 2 E. D. Smith, 43; *Downer v. Hollister*, 14 N. H. 122; 12 Am. & Eng. Encyc. of Law, 402, and cases there cited.) And the subsequent order of the justice of the peace attempting to vacate his former order vacating the judgment and granting a new trial certainly could not revive or resuscitate the former defunct judgment. There being, then, no valid judgment in existence to uphold the execution when the same was levied upon Olson's property, the execution was itself absolutely void, and it may be attacked collaterally as well as directly, and its enforcement be restrained by injunction. (1 Freeman, Ex., § 20; 12 Am. & Eng. Encyc. of Law, 400, 401; *Mo. Pac. Rly. Co. v. Reid*, 34 Kas. 410, 413.)

It is further claimed by the defendants, Lindgrove and Nunnally, that the plaintiff, Olson, who was defendant in the execution and whose property was levied on, is estopped from claiming that the judgment of the justice of the peace is void, for the reason that he gave a redelivery or forthcoming bond, and was thereby permitted to retain the possession of the property levied on; and several authorities are cited as authority for this claim, among which are certain decisions rendered by this court. (*Sponenbarger v. Lemert*, 23 Kas. 55; *Haxtun v. Sizer*, 23 id. 310; *Wolf v. Hahn*, 28 id. 588; *Case v. Steele*, 34 id. 90.) These cases have no application to the present case. These cases have nothing to do with void judgments, void executions, or void levies, but go only to this extent: Where property of the defendant is levied upon by an officer under judicial process, and the defendant or anyone for him afterward gives a redelivery or forthcoming bond, the party giving such bond or procuring it to be given is estopped from afterward asserting title to the property in any person other than the defendant in the process. But where a judgment upon which an execution is issued and levied is void, which



renders all the subsequent proceedings void, the party giving the redelivery bond, and thereby obtaining the right to retain the possession of the property levied on, does not thereby estop himself from afterward asserting either directly or collaterally that the judgment and all things depending thereon are utterly and absolutely null and void. (2 Freeman, Ex., § 264; *Earl v. Camp*, 16 Wend. 562; *Perry v. Williams*, 39 Wis. 339; *Buckingham v. Bailey*, 4 S. & M. [12 Miss.] 538; *Ex parte Cheatham*, 6 Ark. [1 English], 531; *Newburg v. Munshower*, 29 Ohio St. 617; *Van Cleave v. Haworth*, 5 Ala. 188; *Page v. Coleman*, 9 id. 275.) We do not hold in this case that a party after giving a redelivery or forthcoming bond may then interpose objections because of any mere irregularities in any of the prior proceedings; but we simply hold that a party giving such a bond is not estopped from afterward asserting that all the prior proceedings are absolutely and utterly void.

The judgment of the court below will be reversed, and the cause remanded for a new trial.

All the Justices concurring.

47	396
49	716
47	396
63	756
47	396
75	748

### T. B. JACKSON V. CORNELIUS G. LINNINGTON.

1. REVIEW — *General Objection*. A party who complains of the rulings of the court in charging the jury, and who seeks to have them reviewed, should specify in his brief and argument wherein the rulings are erroneous. A mere general objection is insufficient.
2. MALICIOUS PROSECUTION — *Probable Cause* — *Liability*. In an action for malicious prosecution upon a charge of malicious trespass, where there was probable cause for commencing the prosecution, and where the defendant, acting upon the advice of attorneys, and believing there was probable cause, in good faith and without malice caused the arrest of the plaintiff, the defendant is not liable to the plaintiff, although one of his purposes was to prevent the construction of a building upon his land.

---

Statement of the Case.

---

3. **FINDINGS—Verdict—Harmony.** If the findings of the jury will fairly admit of an interpretation which will make them harmonious with each other and with the general verdict, that interpretation should be given, rather than one which will overturn and destroy the findings and verdict. (Following *Railroad Co. v. Ritz*, 38 Kas. 404.)

*Error from Brown District Court.*

ACTION for malicious prosecution, by *T. B. Jackson* against *Cornelius G. Linnington*, wherein he complained that he was arrested upon the complaint of Linnington, charged with the offense of malicious trespass, without reasonable or probable cause. He alleged that upon a trial he was acquitted of the crime, and claimed damages in the sum of \$1,000. The answer of the defendant was a general denial. At the trial the plaintiff offered testimony showing his arrest and acquittal, and tending to show that the defendant had made a conditional sale of a lot to a certain purchaser, and that he informed the plaintiff that he might obtain the job of building a house on the lot if he should see the purchaser, and that plaintiff saw the purchaser and took the contract to build the house. Evidence was also given tending to show that before the sale of the lot was completed the plaintiff took possession of the same and dug up and removed clay, dirt, and mould, and commenced the building of a house on the lot, without the consent of the defendant, and that the defendant notified the plaintiff that the property belonged to him, and to quit digging up and removing clay and dirt, and to quit building or otherwise trespassing on the lot, before beginning the prosecution, which the plaintiff refused to do. Evidence was also given tending to show that the defendant caused the plaintiff to be arrested in order to prevent the building of the house, but that before said prosecution was begun he consulted reputable attorneys of experience in the practice of the law, and that after a full statement of all the material facts had been submitted to the attorneys, they advised him that the plaintiff had committed a crime and to bring a prosecution for the same. Evidence was further given tending to show that the defendant commenced the prosecution in good faith, on the advice of his at-

---

Jackson v. Linnington.

---

torneys, without malice, and believing that there was probable cause for bringing the same, and that the action could be maintained. There was also testimony tending to show that the plaintiff was guilty as charged, and that there was probable cause for commencing the prosecution.

The plaintiff asked the court to charge the jury that if they found that the object of the defendant in causing the arrest of the plaintiff was to prevent him from constructing a building on the lot, then such arrest and prosecution was without probable cause; and that if they found that the defendant caused the arrest for the purpose of enforcing a civil right, they should find that the arrest was malicious and without probable cause. The court refused these requests, and charged the jury, among other things, that if the prosecution was instituted merely to prevent the plaintiff herein from erecting a building on the lot in controversy, such fact would not constitute a probable cause for commencing the prosecution. The jury returned a general verdict in favor of the defendant, and also returned the following findings of fact:

"Ques. Was the object of the defendant in prosecuting the plaintiff to prevent the plaintiff from building a building on said lot 13? Ans. Yes; and to prevent any one getting possession before a pending contract was consummated.

"Q. At the time of said prosecution, on December 13, 1887, did the defendant have reasonable grounds to believe that the plaintiff had committed the offense charged? A. Yes.

"Q. Did the defendant act upon the advice of his attorneys, after a full consultation and statement of the facts, in commencing said prosecution? A. Yes.

"Q. Was there probable cause for commencing said prosecution? A. Yes.

"Q. Was said prosecution malicious on part of defendant, or did he act with malice toward plaintiff, bringing said action? A. No.

"Q. Did plaintiff suffer any damage from imprisonment? A. No.

"Q. If the last question is answered in the affirmative, state how much. A. Not any.

"Q. How much time did the plaintiff lose from his business by reason of his arrest, if any? A. One day.

---

Opinion of the Court.

---

"Q. How much, if anything, did plaintiff pay out in attorney's fees for his separate defense in said action? A. Twenty dollars.

"Q. If question No. — is answered in the affirmative, how much do you allow for time, if anything? A. Not anything."

A motion for a new trial was made and overruled, and judgment was given for the defendant in accordance with the general verdict. The plaintiff complains, and comes here.

*W. D. Webb*, and *Grant Harrington*, for plaintiff in error.

*W. I. Stuart*, and *S. L. Ryan*, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J.: The evidence in the case is not preserved, but the record contains a short statement of what the evidence offered by the parties tended to show, and that is sufficient to raise the questions which the plaintiff desires to present upon the testimony and findings. Complaint is first made of the refusal of instructions requested, as well as the giving of instructions which were objected to. While a general complaint is made, the plaintiff fails to indicate what the specific objections are, or to point out wherein the rulings are deemed by him to be erroneous.

The charge given appears to embody all material and correct instructions that were requested, and to fairly present the case to the jury. One request which raises the same question as is raised upon the findings was, that if the jury found that the purpose of the defendant in bringing the prosecution was to prevent the plaintiff from building a house, then such a prosecution was without probable cause. This instruction was modified by the court. After defining the offense of malicious trespass, and what facts would be sufficient to constitute probable cause for the institution of a prosecution therefor, the court charged that, "if said prosecution was instituted *merely* to prevent the plaintiff herein from erecting a building on the lot in controversy, such fact would not constitute probable cause for commencing the prosecution." This was a

---

Jackson v. Linnington.

---

proper modification. If the sole purpose of the prosecution was to prevent the erection of a building, it would not have been justified. The construction of the house, however, appears to have involved the digging and preparation of a foundation, and hence the defendant may have desired not only to prevent the erection of a building, but also intended to prosecute and prevent the offense which had been committed, and the further commission of the same. Evidence was given tending to show that the defendant notified the plaintiff that the lot upon which he was digging and from which he was removing clay and dirt belonged to him, and warned him against further trespassing there; but, notwithstanding this warning, he refused to quit work, and further continued to trespass upon the defendant's property. There was also testimony that the defendant before he commenced the prosecution counseled with attorneys, and after presenting them with a full statement of all the facts, they advised him that the plaintiff was guilty of the offense and that the prosecution could be maintained. Acting on their advice, he, in good faith and without malice, believing the action could be maintained, and that there was probable cause for making the charge, began the prosecution. And if there was probable cause for commencing the prosecution, and he, acting upon the advice of attorneys, in good faith believed there was probable cause, and if in good faith and without malice he caused the arrest and prosecution of the defendant, the fact that he may also have desired to prevent the construction of the building upon the lot would not entitle the plaintiff to recover. On the other hand, if his sole purpose was to prevent the erection of a building, or the mere enforcement of a civil right, then the arrest and prosecution would be without probable cause, for which the defendant would be liable.

In one of the findings returned by the jury, it is stated that the object of the defendant was to prevent the plaintiff from erecting a building on his land; and the plaintiff contends that this finding entitled the plaintiff to a recovery. The finding, however, when construed in connection with the others

returned by the jury, shows that this was not the only object of the defendant in beginning the prosecution, but that he acted in good faith and without malice in the institution of the prosecution. It is found that he had reasonable grounds to believe that the plaintiff had committed the offense charged; that he acted upon the advice of his attorneys, after a full consultation and a statement of all the material facts, and that he relied upon the advice of the attorneys in bringing the action; and also that there was probable cause for the commencement of the prosecution. If the findings will fairly admit of an interpretation which will make them harmonious with each other and with the general verdict, that interpretation should be given, rather than one which will overturn and destroy the findings and verdict. (*Railroad Co. v. Ritz*, 33 Kas. 404; *U. P. Rly. Co. v. Fray*, 43 id. 750.) The findings may fairly be construed to show that the defendant instituted the prosecution in good faith, to punish the plaintiff for the offense charged against him. Although he desired to prevent the building of a house, he also desired and intended to procure the punishment of a public offense, and to prevent the further commission of the same. The digging up of the clay and dirt, and the removal of the same from the defendant's land without consent or right, constituted probable cause, and it also constituted a part of the construction of the house. We think the findings may be fairly harmonized with each other and with the general verdict.

The judgment of the district court will be affirmed.

All the Justices concurring.

## THE STATE OF KANSAS v. A. W. HEDEEN.

1. *HIGHWAY — Establishment — No Notice — Waiver.* Where no notice is given to one of the owners through whose land a public highway is laid out, nor any finding made by the board of county commissioners that the land-owner is a non-resident of the county, the want of jurisdiction by the absence of notice or such a finding is cured by the presentation by him to the board of county commissioners of a claim for damages in consequence of the opening of the road through his land. (*Comm'rs of Woodson Co. v. Heed*, 33 Kas. 34, cited and followed.)
2. ——— *No Lawful Obstruction, When.* After a public highway has been established and ordered to be opened, and the land-owner presents to the board of county commissioners a claim for damages and compensation on account of the laying out of such road across his land, and the same are allowed, from which no appeal is taken, even if the notice to open the road directed to the land-owner is irregular or defective, but the overseer, after giving a notice, actually proceeds to open the road, the land-owner cannot thereafter lawfully obstruct the same.

*Appeal from Allen District Court.*

THE material facts are stated in the opinion.

*Geo. R. Peck, Oscar Foust & Son, and A. A. Hurd*, for appellant.

*John N. Ives*, attorney general, and *H. A. Ewing*, county attorney, for The State.

Opinion by SIMPSON, C.: The appellant, who is a division roadmaster of the Atchison, Topeka & Santa Fé Railroad Company, was convicted in the district court of Allen county for willfully obstructing a public highway. The particular act of obstruction consisted of fencing up a county road that was located and opened across the track of the Southern Kansas Railroad Company, afterward the Atchison, Topeka & Santa Fé Railroad Company. The alleged offense was charged to have been committed on or about the 10th day of February, 1890. The case was tried by the court, a jury being

## Opinion of the Court.

waived. The road was established by an order of the board of county commissioners of Allen county made on the 4th day of January, 1887, and on the same day the road was ordered opened. It is not claimed or pretended, up to this time, that the Southern Kansas Railroad Company had any notice of these road proceedings, but on the 21st day of March, 1888, the following letter was received by the county board:

“THE SOUTHERN KANSAS RAILWAY COMPANY.  
TRACK, BRIDGE AND BUILDING DEPARTMENT.

LAWRENCE, Kas., March 21, 1888.

*“To the Board of County Commissioners, Allen County, Iola, Kas.:*

“GENTLEMEN—In reference to the opening of the county road on the east and west  $\frac{1}{4}$  line of section 15, township 25, range 18, Allen county, I met the viewers, Messrs. McCurley, Moon, and DeWitt, on February 29, as stated in the notice. It was there agreed that the Southern Kansas Railway Company should present to your board an application for damages, caused by the opening of above road over the right-of-way of said S. K. Rly. Co.

“Inclosed you will find such an application.

Yours truly, M. N. WELLS, *Engineer.*”

Accompanying this letter was a claim for damages in these words:

“APPLICATION FOR DAMAGES.

*“To the Board of County Commissioners, Allen county, Kansas, engaged in laying out a road on the east and west quarter line of section 15, township 25, range 18, in Allen county, Kansas, petitioned for by ——— and others:*

“GENTLEMEN—The Southern Kansas Railway Company respectfully claims \$249<sup>42</sup>/<sub>100</sub> as its damages and compensation on account of laying out said road across the railroad track and right-of-way 100 feet wide of said company in the east half of section 15, in township 25 south, range 18 east of the 6th principal meridian, in Allen county, Kansas.

“Dated this 21st day of March, 1888.

THE SOUTHERN KANSAS RAILWAY COMPANY.

By M. N. WELLS, its Agent, *Engineer.*”

It was shown by the journal of the board of county commissioners, and by a record of county warrants issued, that in



July, 1888, an allowance was made and warrants issued to the Southern Kansas Railroad Company for land taken and for fencing, crossing, etc., of this county road. This application for damages filed by the railroad company gave the board of county commissioners jurisdiction of the subject-matter, and of the railroad company, the same as if the notice required by the road law had been regularly served, and such jurisdiction relates back to the commencement of the proceedings. (*Comm'rs of Woodson Co. v. Heed*, 33 Kas. 34, and cases cited.) It is sought to evade the curative effect of the presentation of this claim for damages, by an attempt to make it appear that the talk between viewers and the engineer of the company that preceded the presentation of the claim referred to the crossing of a state road in the same section, but as that road was located and opened before the railroad was built, and as it was the duty of the railroad company to establish the crossing and restore the state road at the point of crossing to its natural condition, we are not impressed favorably with such an explanation. It is also claimed that the claim was merely an estimate, originating in an attempt to compromise differences, and not a deliberate act of presentation for the purposes of compensation. This contention is partially supported by the evidence of Wells, the engineer of the railroad company, but the drift of all the other facts is against it, and they are sufficient to support the judgment of the trial court. This appears to us to be a sufficient answer to the contention of the plaintiff in error, that, in order to sustain a conviction, it must be shown that there was a public road legally laid out.

The next query is, whether or not the railroad company was served with notice to open the road across its track for public travel. On the 9th day of February, 1889, the following notice was served on one J. S. Turner, the ticket agent of the railroad company at the depot of said railroad company at Iola, Allen county, to wit:

*"To the Southern Kansas Railway Company: The road petitioned for by R. L. Thompson and others, and which runs through a portion of your lands, to wit: Commencing at*

---

Opinion of the Court.

---

the southwest corner of the northeast quarter of section 16, town 25, range 18, and running thence east  $1\frac{1}{2}$  miles, and ending at the northeast corner of the southeast quarter of section 15, town 25, range 18, situated in Iola township, Allen county, Kansas, was, on the 4th day of January, 1887, duly established by the board of county commissioners of said Allen county; and said board has ordered the trustee of said township to cause said road to be opened to public travel. You are therefore notified to open said road through your said lands, as surveyed and marked by the county surveyor of said county under the direction of the viewers of said road, within 90 days after the service of this notice on you, or it will become my duty to enter, or to depute some one to enter, upon said lands and open said road.

"Witness my hand, this 9th day of February, 1889.

D. C. NEER, *Road Overseer*  
*of District No. 6, of Iola Township, Allen County, Kansas."*

It appears from the evidence of Turner that the Southern Kansas Railway Company ceased to operate the road on the 1st day of May, 1888, and from and after that time it was operated by the Atchison, Topeka & Santa Fé Company; so that the technical point is made on this state of facts, that the latter company was not served with the 90 days' notice required by the road law to be given to owners to open the road. The only change in the transaction of business testified to by the agent of the Southern Kansas, who continued to be the agent of the Santa Fé, was in the name of the company operating the road, and this objection is not sufficient for the purpose urged. After the expiration of 90 days from the service of this notice, the road overseer of the district in which the county road crossed the railroad track made a crossing over the track, the balance of the road having been opened for nearly two years; and this defendant, acting under the orders of his superior officers, rebuilt the fences enclosing the right-of-way of the railroad company, and removed the crossing made by the road overseer. From June 20, 1872, to April 25, 1874, the notice prescribed by § 12, chapter 108, Laws of 1874, (¶ 5485, Gen. Stat. of 1889,) was required to be in writing. (Laws of 1872, ch. 175, § 5.) But since April 25, 1874,

---

Pollard v. National Bank.

---

up to the present time, it has not been necessary that the notice should be in writing. (*Wilson v. James*, 29 Kas. 249.) After the road was established, the allowance of the damages presented by the Southern Kansas Railway Company, and the opening of the road by the overseer, even if the notice to open such road was defective or irregular, we do not think that it could thereafter be legally obstructed.

On the state of facts presented by this record, we think the judgment of conviction was right, and recommend its affirmation.

By the Court: It is so ordered.

All the Justices concurring.

---

E. K. POLLARD *et al.* v. THE FIRST NATIONAL BANK  
OF NEWTON.

**BANK—Transfer to Avoid Taxation—Evidence—Finding.** Whether a resolution of the directors of a national bank made on the 28th day of February, declaring a dividend of \$40,000, payable out of the surplus, to be placed to the credit of stockholders' account, and to remain as a deposit until otherwise ordered, is a mere subterfuge to avoid taxation on the 1st day of March following, or is made in good faith, is a question of fact to be determined by the trial court; and that court having heard the testimony of witnesses and made a finding in favor of the good faith of the transaction, and there being some evidence to support such finding, it will not be disturbed by this court.

*Error from Harvey District Court.*

ACTION by the *First National Bank of Newton, Kas.*, against *Pollard*, to enjoin the collection of certain taxes levied against the plaintiff. At the February term, 1891, the injunction was granted. The facts appear in the opinion.

*C. S. Bowman*, county attorney, for plaintiffs in error.

*Ady, Peters & Nicholson*, for defendant in error.

## Opinion of the Court.

Opinion by SIMPSON, C.: The following summary of the material facts is taken from the brief of counsel for plaintiffs in error, and is sufficient to present the controlling question in the case: Prior to February 28, 1889, the First National Bank of Newton, Kas., had a paid-up capital stock of \$50,000, and an undivided surplus of \$50,000, and on said February 28, 1889, the directors of said bank passed and adopted a resolution, which is in the words and figures following:

“OFFICE OF THE FIRST NATIONAL BANK,  
NEWTON, KAS., February 28, 1889.

“At a meeting of the directors of the First National Bank held February 28, 1889, it was resolved that a dividend of forty thousand dollars (\$40,000) be declared, payable out of surplus, and the same amount placed to credit of stockholders' account. Said stockholders' account to remain as a deposit in said bank unless otherwise ordered by the board of directors.

“The said \$40,000 belongs to the several stockholders, as follows:

S. Lehman.....	\$14,640 00	owning 188 shares.
A. B. Gilbert.....	10,000 00	“ 125 “
F. S. Steinkirohmer.....	4,000 00	“ 50 “
B. Lombard, jr.....	5,000 00	“ 70 “
I. J. Cook.....	1,840 00	“ 28 “
C. W. Goss.....	1,520 00	“ 19 “
R. C. Loon (estate).....	1,680 00	“ 21 “
A. Entz.....	320 00	“ 4 “
A. M. J. Winey.....	400 00	“ 5 “
	<u>\$40,000 00</u>	<u>500 “</u>

“The above amounts belonging to the several stockholders are to be held as above directed.

“Attest: A. B. GILBERT, *Cashier and Secretary.*”

Thereupon, the cashier of said bank charged the surplus account on the books of said corporation as follows: “February 28, 1889, to stockholders' account, as per resolution of the directors, \$40,000;” and then opened up a new account, designated “Stockholders' Account,” and made the following entry therein and thereunder: “February 28, 1889, by surplus account, as per resolution of directors, \$40,000.” The capital, surplus and stockholders' account remained in this condition until March 8, 1890, and the officers of the bank

---

Pollard v. National Bank.

---

returned to the assessor for taxation for the year 1890, and as of the 1st day of March of said year, \$50,000 of capital stock and \$10,000 of undivided surplus or profits. Afterwards the board of county commissioners of Harvey county made and adopted a resolution and order in the words and figures following:

“NEWTON, KAS., July 11, 1890.

“The following order was made in the matter of assessment of the First National Bank of Newton, the bank waiving formal notice, and appearing by S. Lehman and A. B. Gilbert, its president and cashier, and the board, after hearing their statements and being fully advised, ordered and directed that there be added to the assessment list of said bank the sum of \$13,335; or, if said bank should prefer to have the whole assessment made to its stockholders and furnish the county clerk a list of the names of the stockholders, and the amount of stock held by each, then said clerk shall assess \$53 on each share, and the said clerk shall delay making such assessment for the period of five days, to give said bank an opportunity to test the validity of such increased assessment by injunction or otherwise. And said clerk is directed to forthwith give said bank notice of this order.”

Afterward the county clerk added said amount to the amount returned by the officers of said bank for taxation. On February 26, 1891, the First National Bank brought an action in the district court of Harvey county against the plaintiffs in error, to restrain the collection of the taxes levied on the amount so added to the assessment list of said bank by the board of county commissioners, as aforesaid, which action was defended by the plaintiffs in error, and on the trial of said cause it was agreed, admitted and stated in open court that said bank made no objection on account of the fact of the capital of said bank being assessed as the property of said bank instead of as the property of the stockholders, and waived all objection to the assessment of such capital, surplus and profits direct to the bank instead of to its stockholders—but said bank contended only that the \$40,000 added by the county commissioners for taxable purposes was not a part of the capital, surplus, or undivided profits of said bank, to be returned in any manner for taxable purposes.

---

Opinion of the Court.

---

The court below, after hearing the evidence offered by the respective parties and argument of the respective attorneys, found for said bank, and that said \$40,000 was not undivided surplus or profits of said bank, and gave judgment enjoining and restraining the plaintiffs in error from collecting the taxes levied on said \$40,000. The plaintiffs in error filed a motion for a new trial, which was overruled, and said cause is brought here for review.

The sole and only question involved is, was said \$40,000, on March 1, 1890, a part of the undivided profits or surplus of said bank; or, in other words, should said \$40,000 be considered in arriving at the value of the undivided profits and surplus of said bank for taxable purposes? The general finding of the trial court in favor of the defendant in error, and its order granting a perpetual injunction, resolves the question of fact in favor of the bank. The theory of the plaintiffs in error is, that the act of the bank in changing the \$40,000 from one account to another did not in any manner withdraw said amount from the control of the officers of the bank, or place respective amounts of it within the control of individual stockholders, but that it was a subterfuge to avoid taxation. What the inducement was is a question of fact, as there is no doubt but the stockholders can legally control and dispose of the surplus. On this question of fact the trial court heard the witnesses, and its finding being supported by some evidence, it will not be disturbed by this court. Our duty is a plain one. We must recommend that the judgment be affirmed.

By the Court: It is so ordered.

All the Justices concurring.

47	410
52	131

M. S. TYLER, *late doing business as Western Lumber Company, et al.*, v. MOSES T. JOHNSON.

**HOMESTEAD—Sale under Execution—Mechanic's Lien.** In an action upon a promissory note, where the court finds that the debt for which such note was given was for lumber and material furnished by the plaintiff, and used by the defendant in the erection of a dwelling-house upon his homestead while he was the owner thereof, such finding is conclusive; and where a judgment for the amount due upon such promissory note is rendered upon such finding, *held*, that under an execution issued upon such judgment, the officer may, if no personal property of the judgment debtor can be found, levy upon the homestead to satisfy such execution.

*Error from Harvey District Court.*

ACTION by *Johnson* against *Tyler* and others, to enjoin the sale of certain property under execution. Judgment for the plaintiff, at the May term, 1888. The defendants bring the case to this court.

*Clarence Spooner*, for plaintiffs in error.

Opinion by GREEN, C.: R. M. Hamill owned and occupied certain premises in Harvey county as a homestead. On the 8th day of August, 1883, he conveyed the same to his wife, Ruby E. Hamill. Some time before such conveyance, R. M. Hamill had purchased of M. S. Tyler, doing business as the Western Lumber Company, certain lumber and materials for use in the construction of improvements on such premises. On the 4th day of January, 1884, R. M. Hamill gave to the Western Lumber Company his note for the balance due for such material. A suit was afterward commenced by M. S. Tyler, as the Western Lumber Company, in the district court of Harvey county, upon said note, and to foreclose a mechanic's lien. On April 3, 1886, judgment was rendered in favor of Tyler and against Hamill for the amount of such note and interest, but the court did not award a decree for a

---

Opinion of the Court.

---

mechanic's lien. At the time of the rendition of such judgment the court made the following finding of fact:

"That said defendant, R. M. Hamill, is indebted to the plaintiff, M. S. Tyler, doing business as the Western Lumber Company, in the sum of \$199.14, for lumber and material furnished said defendant, R. M. Hamill, and by him used in the erection of a dwelling-house on said premises, while he was the owner thereof, and before said conveyance to Ruby E. Hamill, his wife."

Ruby E. Hamill died intestate on August 5, 1885, leaving R. M. Hamill and some minor children as heirs at law. On May 27, 1886, R. M. Hamill deeded to the defendant in error an undivided half-interest in the premises. On the 6th day of December, 1886, an execution was issued upon the judgment in favor of Tyler, and the sheriff levied upon the undivided interest of the property deeded by Hamill. The defendant in error then brought this action to enjoin the plaintiff in error from selling the property, claiming that the same was exempt as a homestead. The district court decided in favor of the plaintiff below, and perpetually enjoined the sale of the premises.

It is claimed that the finding of the court, that the indebtedness for which the note was given was for lumber and material furnished by Tyler and used by Hamill in the erection of a dwelling-house on the premises in question, while he was still the owner, and the judgment entered upon such finding, constituted a lien upon the property of Hamill, whether a homestead or not; that for that particular debt there was no homestead exemption. This question involves the construction of § 9 of article 15 of the constitution. Section 9 provides for the exemption of 160 acres of farming land, or one acre within the limits of an incorporated city, occupied as a residence by the family; "but no property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon." The plain reading of this clause of the constitution is, that there shall be no exemption for the pur-



---

Tyler v. Johnson.

---

chase-price of land or for improvements erected thereon. The court in this case found that the debt for which judgment was given was for improvements. This finding was as conclusive as the finding of the amount due. (*Reed v. Umbarger*, 11 Kas. 207.)

This court has said, in a case where there was a judgment upon several promissory notes given for the purchase-price of land, that the judgment should be an ordinary personal judgment against the defendant for the amount of the note and costs, authorizing an ordinary execution to be issued against the property in general of the judgment debtor subject to execution; and on such an execution, the officer, after exhausting the personal property of the judgment debtor subject to execution, might levy on such real estate—or on any other real estate of the judgment debtor subject to execution—whether the real estate first mentioned was occupied as a homestead or not. (*Green v. Barnard*, 18 Kas. 518.)

In construing this same clause of the constitution, with reference to obligations contracted for the purchase-price of the homestead, it has been said:

“There is no homestead exemption law as against obligations contracted for the purchase-money. As to such obligations, the rule is just the same as if no exemption law had ever been adopted. And land held as a homestead is, with respect to such obligations, governed by just the same rules as if it were not a homestead.” (*Nichols v. Overacker*, 16 Kas. 54.)

No brief has been furnished us upon the part of the defendant in error; hence we have no means of knowing what claim was made in the district court by the plaintiff below that would take this case out of the rule heretofore established by this court in the case already cited. The court having found that the debt for which judgment was rendered was for lumber and material furnished for improvements, we think there was no exemption, and the sale of the property should not have been enjoined.

The judgment of the district court should be reversed.

By the Court: It is so ordered.

All the Justices concurring.

## CHARLES HORNEMAN V. M. E. HARLAN.

SCHOOL DISTRICT — *Appointment of Treasurer — Failure to Give Bond.*

Where H. is elected as his own successor treasurer of a school district at the annual meeting of said district, and immediately takes the oath of office and continues to perform all the duties of said office for a year without giving a bond, but then gives a bond which is executed according to law, and approved by the director and clerk, and said bond was given as soon as the board fixed the amount of said bond, and afterward, a week or 10 days, the county superintendent appoints H. treasurer for said district, upon the theory that a vacancy exists, because the bond was not given within 20 days after the election of said treasurer, *held*, that no vacancy existed to be filled by appointment of the superintendent, and that the appointment of H. was void.

*Error from Smith District Court.*

THE case is stated in the opinion.

A. H. Ellis, for plaintiff in error.

Opinion by STRANG, C.: This was a proceeding in *quo warranto*, to determine who, as between the parties to the action, was entitled to the office of treasurer of school district No. 115, in Smith county, Kansas. At the annual school meeting in 1882, Horneman was elected treasurer of said district and served three years, and until the annual election in 1885. At that time it was discovered that there should have been an election the year before, in 1884, and upon such discovery in 1885, he was elected for two years to fill the vacancy. He qualified and gave a bond after his election in 1882, and qualified after his election in 1885, but it is not certain that he gave a bond after that election. At the annual school meeting in 1887 he was again elected, and qualified the same day, but did not at that time give a bond. At the meeting of the board, during which he was qualified, he inquired of the director if he had a blank that he could use in giving his bond. The director did not have any blank. He asked Horneman if he had given a bond before when he was elected,

---

Horneman v. Harlan.

---

and was informed by the latter that he did in the sum of \$1,000, and that the amount of money that passed through his hands the previous year was about \$500. The director then said that as he (Horneman) had given a bond before he was elected, and was his own successor, he did not think it was necessary for him to give a new bond; that the old would hold good. The matter of giving a bond was talked about between the director and Horneman, and the clerk of the district and Horneman, several times afterward, Horneman asking both the director and the clerk to procure a blank so he could give a bond. No bond was in fact given until the 28th of June, 1888, the day before the annual school meeting for that year, nor did the board ever formally determine the amount of the bond until the evening before the bond was given. The bond was executed according to law, and approved by the director and clerk of the district on the day of its execution, and was at once delivered by Horneman to the clerk. The clerk, whose term of office expired that day, thinking the bond should be deposited with the county superintendent of schools, and not wanting to take that trouble himself, delivered the bond back to Horneman that evening, that he might send it to the superintendent. Horneman was a blacksmith, and, busy at work at that time, laid the bond in his desk, and forgot that he had it until his attention was called thereto by the director and clerk, some time about a week afterward. In the meantime, there being no bond among the papers turned over to the new clerk, elected at the meeting in June, 1888, the superintendent appointed M. E. Harlan, the defendant, treasurer of said school district. Horneman still claimed to be treasurer and continued to act as such. And from the date of his appointment Harlan claimed to be treasurer, and this action was brought to settle the question as to which was entitled to the office. The case was tried by the court without a jury, resulting in a judgment for Harlan, ousting Horneman from the office, and requiring him to pay costs of suit. Motion for new trial was filed and overruled, and a case made for this court.

The real question in the case is, whether the judgment of the trial court is right. Whether or not the judgment is right depends upon the further question whether or not a vacancy existed that could be filled by the superintendent at the time he appointed Harlan. Our statute, § 5594 of the General Statutes of 1889, reads as follows:

“Every person duly elected to the office of director, clerk or treasurer of any school district who shall refuse or neglect, without sufficient cause, to qualify within 20 days after his election or appointment, or who, having entered upon the duties of his office, shall neglect or refuse to perform any duty required of him by the provisions of this act, shall thereby forfeit his right to the office to which he was elected or appointed, and the superintendent shall thereupon appoint a suitable person in his stead.”

Paragraph 5607 of the same statute relates to the giving of a bond by the treasurer of a school district, and so much of it as is material here reads as follows: “The treasurer shall execute to the district a bond, in double the amount, as near as can be ascertained, to come into his hands as treasurer during the year, with sufficient securities, to be approved by the director and clerk, conditioned to the faithful discharge of the duties of said office.” It will be seen that the statute requires the treasurer to qualify within 20 days after his election, but it is silent as to the time within which he shall execute a bond. In this case the oath of office was administered to Horneman the same evening of his election, which was more than a year before Harlan was appointed, and during all that time Horneman was not only acting as treasurer of the district, but until a few days, not exceeding a week or 10 days, before Harlan’s appointment, his right to the office was never questioned by anyone. Was there a vacancy in the office of treasurer of school district 115 in Smith county, that could be filled by appointment when Harlan was appointed? We think not. Horneman was elected at the annual school meeting in 1887, for the term of three years. He immediately qualified, by taking the oath of office, and while he served nearly a year before he gave a bond, yet he had given a bond before any action was taken

---

Horneman v. Harlan.

---

by the superintendent; so that he had not only been regularly elected to the office, but had complied with all the provisions of the law by taking the oath of office, giving a bond, and the performance of the duties of the office, before the appointment of Harlan. Under such circumstances, we do not think a vacancy existed at the time of the appointment of Harlan by the superintendent. The failure on the part of Horneman to give a bond was the only excuse for the appointment of Harlan by the superintendent. That delinquency on Horneman's part had been removed by his giving a bond, which the court finds was executed according to law, before the superintendent took action; and, as the statute is silent as to the time within which the bond must be given, we think Horneman, who had thus fully complied with all the provisions of the law, was the rightful treasurer of said district at the time of the appointment of Harlan, and that the appointment of Harlan was void, and Horneman continued to be the treasurer of said district.

It was claimed at the trial below by the counsel for Harlan, who have not filed a brief in this court nor appeared to argue the case in person, that the bond of Horneman should have been left with the clerk. It is true that with the clerk is the proper place to deposit the bond of the treasurer. It is also true that the treasurer did deliver his bond to the clerk after its execution. We do not think the fact that the clerk, who, thinking the bond should be deposited with the superintendent, returned it to Horneman that he might so deposit it, invalidated the bond. If Horneman had taken it back with the intention of destroying it, or to withdraw it entirely, it would have been different. There can be no doubt but that Horneman and his sureties, in case of default, would have remained liable on the bond as well after it was returned to him by the clerk for the purpose of delivering it to the superintendent as while it was in the hands of the clerk before its return. And if the district could recover on it in case of default of Horneman, it should still be sufficient to protect him against

an attack upon his right to the office upon the ground that he had given no bond.

It is recommended that the judgment of the district court be reversed, and the case remanded for further proceedings.

By the Court: It is so ordered.

All the Justices concurring.

---

THE BOARD OF COMMISSIONERS OF MIAMI COUNTY V.  
JOHN C. COLLINS.

47	417
680	682

**PROBATE JUDGE—Salary.** A probate judge is entitled to be paid the salary provided for by ¶ 2524, General Statutes of 1889, without proof that he had actually performed the services contemplated by the "act relating to intoxicating liquors."

*Error from Miami District Court.*

THE opinion states the facts.

*Jno. C. Sheridan*, and *W. H. Sheldon*, for plaintiff in error.

*W. H. Browne*, and *Schwyn Douglas*, for defendant in error.

Opinion by SIMPSON, C.: John C. Collins was the probate judge of Miami county for a term commencing on the 12th day of January, 1885, was reelected, and was in office at the time of this trial, at the February term, 1889, of the district court of said county. On the 3d day of January, 1889, he presented to the board of county commissioners of that county a claim, duly verified, for his salary as probate judge for the quarters ending September 30 and December 31, 1887, and March 1, 1888, amounting to \$195, being \$67.50 for the two first quarters, and \$60 for the third quarter, under § 2, chapter 165, Laws of 1887, now a part of ¶ 2524, General Statutes of 1889, reading as follows:

"The probate judge shall receive no fees for his services

under this act, except a salary of \$15 per annum for each one thousand inhabitants in such county, the number to be determined by the last annual census return of such county, but in no case shall such salary exceed the sum of \$1,000 per annum, to be paid by the county commissioners as other salaries."

The population of Miami county in the years 1887, 1888, was 16,249, as shown by the census returns of these years, and these facts were admitted. The board of county commissioners rejected the claim, and Collins appealed to the district court, and a judgment for the full amount was recovered. The case is brought here for review, and the questions presented and discussed are, that the probate judge is not entitled to compensation unless he has actually performed service by granting permits or doing some of the other things required by the statute, and that the legislature has no power, under section 8, article 3, of the constitution, to provide a salary for the probate judge.

Neither of these contentions is supported by reason or authority. The salary granted the probate judge by virtue of ¶ 2524, General Statutes of 1889, is not dependent upon the amount of services rendered. The terms of the statute are absolute and unconditional; his office is open, and he is in attendance day by day to discharge the additional duties imposed upon him by the act of the legislature. If the conditions are such that no labor is imposed upon him, this is no reason why we should disregard a plain command of the law-making power. Such a construction would involve the courts or the boards of county commissioners in prolonged investigations as to whether salaried officers of the state and county had performed all or any of the particular acts enumerated in the statute that are required of persons occupying these salaried positions. The county attorney is paid a salary, and it is not dependent on the fact as to whether the services that are imposed upon the office have been rendered in part or in whole. His compensation does not vary with the amount of service performed, but is fixed arbitrarily by that body that alone has the power to designate it. The object of this law was to pro-

---

Opinion of the Court.

---

vide an officer who would grant permits legally to druggists to sell intoxicating liquor for the purposes and under the conditions imposed, and we have no doubt but that such officer can better discharge his duty by non-action than by the performance of every act contemplated by the terms of the statute.

On the constitutional question it is only necessary to say that the language used in § 8 of article 3, according to the ordinary rules of construction, applies to only those things that are enumerated in the section. "He shall hold court at such times, and receive for compensation such fees," etc., is the language, and this refers to the probate jurisdiction granted by the same section. The legislature has the power under the constitution of casting upon the person who holds the office of probate judge the duty of issuing permits or licenses for the sale of liquors, as provided in chapter 128, Laws of 1881. (*Intoxicating-Liquor Cases*, 25 Kas. 751.) A probate judge may receive judicial powers other than those granted by the constitution to the probate court. (*Young v. Ledrick*, 14 Kas. 92.) If the legislature has the power to add to the duties of the office, it follows that it has power to provide for compensation for the performance of the additional duties, the constitutional provision only fixing compensation for the class of duties therein enumerated.

In any view that can be taken, we think the district court did right, and recommend an affirmance of the judgment.

By the Court: It is so ordered.

All the Justices concurring.



## THE NORTHWESTERN BARB WIRE COMPANY V. JOHN F. RANDOLPH.

**MORTGAGE — Foreclosure — Personal Judgment against Intermediate Grantees.** Where lands previously mortgaged were conveyed to R., who assumed and agreed to pay such mortgages, and R. conveyed the land to N. by warranty deed, and N. subsequently mortgaged to the same parties that held the first mortgages, and these parties commenced their action to foreclose, a personal judgment should be rendered against R. for the amount of the mortgages he assumed to pay, both for the protection of the original mortgagor, who conveyed to R., and for the protection of N., to whom R. conveyed by warranty deed, and the amount collected on said judgment should be applied to the satisfaction of the mortgages that R. agreed to pay.

*Error from Cloud District Court.*

THE material facts appear in the opinion.

*Kennett, Peck & Matson*, for plaintiff in error.

*Theodore Laing*, for defendant in error.

Opinion by SIMPSON, C.: On the 7th day of September, 1887, the plaintiff in error commenced its action in the district court of Cloud county, alleging in its petition the following material facts: On the 10th day of December, 1885, one George H. Wells and wife executed to one R. F. Hermon a promissory note for \$375, securing payment of the same by a mortgage on the northwest quarter of section 23, town 7, range 1 west of the sixth principal meridian. Hermon sold and transferred the note and assigned the mortgage to the plaintiff in error on the 30th day of November, 1886. On the 5th day of November, 1886, George H. Wells and wife sold and conveyed said mortgaged tract of land to John F. Randolph, who assumed and agreed to pay the mortgage given by Wells and wife to Hermon and assigned to plaintiff in error. On the 6th day of November, 1886, Randolph and wife conveyed the land by warranty deed to one W. J. Nye. On the 8th day of November, 1886, Nye and wife executed and delivered

## Opinion of the Court.

to the plaintiff in error two promissory notes amounting to \$727.60, and to secure the payment of the same they gave the plaintiff in error a mortgage on the same land. This tract of land was subject to two prior mortgages in favor of the New England Loan and Trust Company, executed by Wells and wife, for \$1,650 and interest, that are conceded to be the first liens. Wells and wife, Nye and wife, Randolph and other lien holders were made parties, and all served personally or by publication. All made default, and the cause came on regularly for trial at the October term, 1887, of the court. The court found that all of the defendants had been duly served with a summons in this action; that there was due from the defendants Wells and wife the sum of \$462.25, with interest at 12 per cent. per annum; that the defendant John F. Randolph is liable for the payment of this sum by reason of having assumed payment of it in a warranty deed executed by Wells and wife and accepted by him; that there was due from Nye the sum of \$779.94, with interest at 7 per cent. per annum; that the mortgaged premises mentioned in plaintiff's petition is subject first to two mortgages amounting to \$1,650; that the taxes for 1886, assessed upon said land, have not been paid. Judgment was rendered for the sums against Wells and wife and Nye, and the mortgaged property ordered sold, subject to the first lien of \$1,650, and the proceeds of the sale applied, first, to the payment of the costs; second, to the payment of the taxes due; third, to the payment of the plaintiff's judgment against Nye; fourth, to the payment of the plaintiff's judgment against Wells and Randolph. This judgment was rendered on the 18th day of November, 1887. On the 6th day of July, 1888, Randolph filed a written motion praying the court to modify the judgment so that the judgment against Wells and Randolph shall stand as a judgment against Wells alone, and not as a judgment against Randolph for any sum whatever, and to so modify the order for the distribution of the proceeds of the sale that, after the payment of the costs and taxes, the proceeds be next applied to the payment of the judgment against Wells for \$462.25, with interest, and after

---

Barb Wire Co. v. Randolph.

---

that to the payment of the judgment against Nye; and for that cause states that the judgment was irregularly obtained, and is not supported by the allegations of the petition. This motion was sustained by the court, and the judgment was so modified, and this is the ruling complained of by the plaintiff in error, and is the only question presented by the record.

The petition alleges that Wells and wife conveyed the land after they had executed the mortgage to Hermon, to John L. Randolph, and that by the acceptance of that conveyance he assumed and agreed to pay the mortgage to Hermon. The petition also alleges that Randolph and wife conveyed the mortgaged land to Nye by warranty deed, and hence Randolph is obligated to pay the Hermon mortgage, both by his assumption in the deed of Wells and his warranty in the deed to Nye, and this personal obligation ought to be enforced against him by judgment and execution for the protection of Wells, as well as for the protection of Nye. The reason given by the trial court for the modification of the original judgment is, that it was not supported by the allegations of the petition, and while this is true as to the payment of the plaintiff's judgment against Nye, making that payable after the costs and taxes are paid, and before the judgment against Wells is paid, it is not true as to Randolph. The petition does contain positive averments of the assumption by Randolph of the Hermon mortgage, and of his conveyance of the mortgaged land to Nye, a subsequent mortgagor, by warranty deed.

We think that the personal judgment against Randolph in the original entry was right, and if it can be collected by execution, the amount so collected from Randolph personally should be applied to the satisfaction of the mortgage executed by Wells and wife to Hermon. In all other respects the judgment as modified is affirmed.

By the Court: It is so ordered.

All the Justices concurring.

# THE WYETH HARDWARE COMPANY V. THE STANDARD IMPLEMENT COMPANY *et al.*

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—*Preferences*. A debtor in failing circumstances, engaged in making a general assignment of his property for the benefit of all his creditors, cannot at the same time make valid preferences of certain of his creditors, by chattel mortgages or otherwise.

2. ——— *Certain Creditors not Entitled to Preference*. Where an insolvent debtor commences the preparation of chattel mortgages to prefer certain creditors, but while writing such chattel mortgages, and before the execution of the same, determines to make a general assignment of all his property for the benefit of his creditors and selects his assignee therefor, and then proceeds to execute his chattel mortgages to prefer certain creditors, and at once completes his deed of assignment in accordance with his previous resolution, the making of the chattel mortgages and the execution of the deed of assignment will all be treated as a simultaneous or continuous act, and the creditors named in the chattel mortgages will not be entitled to any preference.

3. CASE, *Commented on*. The case of *Bailey v. Manufacturing Co.*, 32 Kas. 78, referred to and commented on.

## *Error from Saline District Court.*

ON September 1, 1887, the *Standard Implement Company* began a suit in attachment in the district court of Saline county against T. C. Ritter & Co. A stock of hardware was attached, a receiver appointed, and the property sold. The *Wyeth Hardware Company* was allowed to interplead in the case, claiming a first lien on the attached property and the proceeds arising from the sale thereof by virtue of a chattel mortgage executed August 30, 1887, by the said T. C. Ritter & Co., to secure a note of \$548.96. At the May term, 1888, the case was tried by the court, without a jury, on the interplea of the *Wyeth Hardware Company*, the answer of the *Standard Implement Company*, and the reply of the *Wyeth Hardware Company*. The court made the following findings of fact and conclusions of law:

"1. On August 30, 1887, T. C. Ritter & Co., of Salina,

47	423
47	504
47	423
51	277
47	423
56	441

## Hardware Co. v. Implement Co.

Kas., were indebted to the Wyeth Hardware Company in the sum of \$548.96. To secure said indebtedness, said T. C. Ritter & Co. executed to said Wyeth Hardware Company a mortgage on their stock of hardware in Salina, Kas., for the amount.

"2. On said August 30, 1887, T. C. Ritter & Co. gave other mortgages on said stock, amounting to about \$1,100.

"3. After the execution and filing of said mortgage to the Wyeth Hardware Company, and on the same day, T. C. Ritter and P. J. Ritter executed a deed of assignment for the benefit of the creditors of the firm of T. C. Ritter & Co., and signed it with the firm-name.

"4. At that time the firm of T. C. Ritter & Co. consisted of T. C. Ritter, P. J. Ritter, and H. M. Sturdevant.

"5. At the date of making said mortgages the firm of T. C. Ritter & Co. was insolvent.

"6. On September 1, 1887, the Standard Implement Company and other creditors of T. C. Ritter & Co. attached the stock of goods mortgaged to said Wyeth Hardware Company. Afterward E. W. Blair was appointed receiver to take charge of said attached property."

"The mortgage of the Wyeth Hardware Company is void, and is no lien on the funds in the hands of the receiver. The mortgages executed by T. C. Ritter & Co., in favor of Wyeth Hardware Company and other creditors on August 30, 1887, were made voluntarily by T. C. Ritter without solicitation from said creditors, and as part of the plan of said Ritter to abandon control of his property by making an assignment thereof for the benefit of creditors, with a preference of Wyeth Hardware Company and others. The mortgages and deed of assignment were made at substantially the same time and as part of one and the same transaction. The Wyeth Hardware Company did not ratify the making of said mortgage and accept of the same until after the execution of the deed of assignment, and had no knowledge that the making of such mortgage was contemplated until notified at St. Joseph, by telegram from Salina."

Upon the findings of fact, the court adjudged that the mortgage of the *Wyeth Hardware Company* was null and void, and not a valid lien upon or claim against the funds in the hands of the receiver, and further adjudged that the *Wyeth Hardware Company* pay the costs of the proceeding, taxed at

## Opinion of the Court.

— The *Hardware Company* excepted, and brings the case here.

*R. A. Lovitt*, for plaintiff in error.

*Garver & Bond*, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: This case was tried by the court without jury. The court made the following finding of fact:

"The mortgages executed by T. C. Ritter & Co. in favor of the Wyeth Hardware Company and other creditors, on August 30, 1887, were made voluntarily by T. C. Ritter & Co., without solicitation from such creditors, and as part of the plan of Ritter to abandon control of his property by making an assignment thereof for the benefit of his creditors, with a preference to the Wyeth Hardware Company and others. The mortgages and deed of assignment were made at substantially the same time, and as part of one and the same transaction. The Wyeth Hardware Company did not ratify the making of the mortgage and accept the same until after the execution of the deed of assignment, and had no knowledge that the making of such mortgage was contemplated until notified at St. Joseph, by telegram from Salina."

The contention in this case is, that the evidence does not sustain this finding; and further, if the finding is supported, that the mortgage to the Wyeth Hardware Company is not null and void, as declared by the trial court. We think the finding of fact referred to is fully sustained by the evidence. It is a familiar doctrine that every presumption upon appeal in error is in favor of the finding and judgment below. The burden is on the appellant, or party complaining, to show error. The Wyeth Hardware Company does not appear in this case as a vigilant creditor, urging the execution of a chattel mortgage to secure its indebtedness. The evidence shows that on August 30, 1887, T. C. Ritter & Co., being in an insolvent condition, and having determined to turn over their property to their creditors by assignment, and desiring, in doing so, that certain creditors might be preferred in the payment of

their claims, executed five chattel mortgages, to Smith George Rothschild Bros., B. E. Quincy, the Wyeth Hardware Company, and Wight & Henne, respectively; and that, at the same time, they executed a general deed of assignment of their property for the benefit of all their creditors. The writing of the mortgages was concluded about 4 o'clock P. M. on August 30th, and as soon as completed the mortgages were deposited with the register of deeds of the county; that of the Wyeth Hardware Company being indorsed as filed at 4:20 P. M. The chattel mortgages, and also the deed of assignment, were written at Lovitt & Sturman's office in Salina, by Mr. Sturman. The mortgages were taken to the court-house and filed about the same time. Smith George, the assignee named in the deed of assignment, took the mortgages to the court-house for record. After leaving the mortgages for record, he went back in about half an hour to Lovitt & Sturman's office, and when he got back the deed of assignment had been written up, and he was in the office when the deed was signed. Before the mortgages were executed, it was agreed that he should be the assignee of the deed which was to be prepared at once. Under the evidence and the finding of the trial court, the making of the chattel mortgages and the execution of the deed of assignment must all be treated as a simultaneous or continuous act. The statute provides that—

“Every voluntary assignment of lands, tenements, goods, chattels, effects and credits, made by a debtor to any person in trust for his creditors, shall be for the benefit of all the creditors of the assignor, in proportion to their respective claims; and every such assignment shall be proved or acknowledged and certified and recorded in the same manner as is prescribed by law in cases wherein real estate is conveyed.” (Gen. Stat. of 1889, ¶ 342; Gen. Stat. of 1868, ch. 6, § 1.)

In *Bailey v. Manufacturing Co.*, 32 Kas. 73, it is declared “that an insolvent, as long as he retains a *jus disponendi* in his property, may appropriate it to the payment of his debts and may prefer creditors. He may use all of his property th

## Opinion of the Court.

1. Assignment for benefit of creditors—preferences. way, or he may so use a part, and make a general assignment of the remainder.” But a debtor, in failing circumstances, engaged in making a general assignment of his property for the benefit of all his creditors, cannot at the same time make valid preferences of certain of his creditors by chattel mortgages or otherwise.

It is said in *Shillito v. McConnell* (Sup. Ct. of Ind.), 26 N. E. Rep. 832, that—

“While it cannot be said that the debtor has in fact surrendered dominion over his property until the assignment is complete, as from the purely voluntary nature of the transaction he may at any time before the final act change his mind and refuse to complete it, yet, being completed, we think it ought to be held to relate back to the time when it was actually commenced, and cover all intervening transactions. The act of making the assignment embraces the preparation and execution of the necessary instruments; and whether that takes a long or a short time, it certainly must all be treated as one continuous act. To say that the debtor's surrender of his absolute control over the disposition of his property is to be dated from the time he actually commences to make the assignment, is to give to the entire transaction the character of good faith, and make it in fact what it purports to be, an effort to secure to all his creditors that equal consideration contemplated by the statute. But to hold that while he is thus

2. Certain creditors not entitled to preference. engaged he may at the same time successfully prefer favored creditors, is to hold that he may at one and the same time do two exactly contradictory acts. It is to hold that he may be engaged in making a voluntary assignment for the benefit of all his creditors, insuring the equal distribution of all his property among all of them, without preference, and also in securing to some of these creditors payment in full of their claims to the exclusion of others; something as difficult of accomplishment as the equestrian feat of riding two horses in opposite directions at the same time.”

It is urged upon the part of the hardware company that the prior decisions rendered by this court uphold the chattel mortgage given to that company. The following cases are cited in support of this claim: *Randall v. Shaw*, 28 Kas. 419; *Tootle v. Coldwell*, 30 id. 125; *Bailey v. Manufacturing Co.*,



32 id. 73; *McPike v. Atwell*, 34 id. 142; *Deford v. Nye*, id. 665. In neither of the cases of *Randall v. Shaw*, supra, nor *Tootle v. Coldwell*, supra, was there any general assignment; therefore, in those cases, it cannot be said there were any preferences of creditors while the insolvent debtor was engaged in the act of making an assignment under the terms of the statute, because no assignment was ever consummated. In *McPike v. Atwell*, supra, the chattel mortgage was executed and delivered on May 7, 1884; the deed of assignment was executed and delivered on the 19th day of June, 1884. The instruments were not executed at substantially the same time or as a part of one and the same transaction. In *Deford v. Nye*, supra, the opinion states that there "was competent testimony to show there was no connection between the making of the mortgages and the deed of assignment, and that they were not intended or treated as a single transaction."

3. Case, commented on.

*Bailey v. Manufacturing Co.*, supra, the insolvent debtor agreed to execute the chattel mortgages on January 17 or 18, 1882. The mortgages were executed on January 19, 1882, and filed for record at 5 o'clock P. M. of that day. The deed of assignment was not executed until the next day—January 20, 1882—and filed for record at 9 o'clock A. M. of that day. That case, in some of its features, is similar to this, but it could not be said in that case, as it clearly can in this, that the making of the chattel mortgages and the execution of the deed of assignment were a simultaneous and continuous act. If, however, there is any declaration of law in this case which is at variance with the views of the court announced in the case of *Bailey v. Manufacturing Co.*, we are of the opinion, after mature consideration, that that case must be modified to conform with the views herein expressed.

The judgment of the district court will be affirmed.

All the Justices concurring.

## THE WOODSON MACHINE COMPANY V. H. F. MORSE.

**PLEADING — Burden of Proof.** Where, under the pleadings and § 108 of the civil code, the plaintiff's case is admitted by the defendant, and where nothing materially adverse is admitted by the plaintiff, the burden of proof rests upon the defendant.

**INSTRUCTION — Error.** Where the burden of proof under the pleadings and the law rests upon the defendant, it is material error for the court to instruct the jury otherwise.

*Error from Trego District Court.*

**ACTION** to recover upon two promissory notes. Judgment for the defendant, *Morse*, at the May term, 1888. The plaintiff *Company* brings the case to this court. The facts appear in the opinion.

*Lee Monroe*, and *Williams, Lawrence & Bancroft*, for plaintiff in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought in the district court of Trego county by the Woodson Machine Company, a corporation, against H. F. Morse, to recover on two promissory notes, each for \$550, each dated August 2, 1884, one due November 1, 1885, and the other due November 1, 1886, on the first of which a payment was indorsed of \$139. The defendant answered, admitting the execution of the notes, calling them mortgage notes, (and there were stipulations in them which would probably authorize such a designation,) and alleging that the plaintiff had taken the possession of the mortgaged property, (which was personal property,) of the value of \$1,500, and had converted the same to his own use; and that a credit therefor of only \$139 had been given to him; and asking that so much of the value of the property as might be necessary to discharge the notes should be applied to that purpose, and that he should have judgment for the remainder. The plaintiff replied, denying

all the allegations of the defendant's answer except such were admitted in the plaintiff's petition and reply, and alleging that a chattel mortgage had in fact been given by the defendant upon the aforesaid property to secure the aforesaid notes, and that the plaintiff did take the property into its possession, and sold the same in accordance with the provision of the chattel mortgage, and realized therefrom \$200, less expenses; or in other words, that it realized only \$139 over and above expenses. The chattel mortgage was set out in full and made a part of the plaintiff's reply. Upon these pleadings, trial was had before the court and a jury, and the jury found in favor of the defendant and against the plaintiff, and assessed the amount of the defendant's recovery at \$25, and also made special findings of fact; and upon such verdict and findings the court below rendered judgment in favor of the defendant and against the plaintiff for the amount of the verdict; and the plaintiff, as plaintiff in error, brings the case to this court for review.

The plaintiff in error has alleged numerous errors, but we think it will be necessary to consider only a very few of them, and we shall consider only a few of them for the reason, among others, that the defendant in error has not filed any brief nor made any appearance in this court, and therefore has not given any explanation of any of the alleged errors. Among the alleged errors complained of are the following: (1) That the defendant was permitted, over the plaintiff's objections, to testify concerning a *conversation* had between himself, the defendant, and one T. W. Rogers, after this action was commenced, and concerning matters material to the controversy; (2) that the court erroneously instructed the jury *orally* after it had been properly requested to instruct the jury in *writing*; (3) that the court in giving instructions to the jury *misconstrued* the chattel mortgage, and for that reason *gave erroneous instructions*; (4) that the court erroneously *took some matters from the jury* which ought to have been left with the jury to decide; (5) that the court erroneously instructed the jury in substance that *the burden of proof rested upon the plaintiff*,

## Opinion of the Court.

guage being: "Gentlemen, the plaintiff in this case must  
ve their case by a preponderance of the testimony," etc.  
We are inclined to think that the court below erred in all  
foregoing particulars, but we shall further consider only  
last. The plaintiff's entire case was admitted by the  
adings in connection with § 108 of the civil code. Under  
pleadings and that section, it was admitted by the defend-  
that the plaintiff was a duly-existing corporation; that  
notes sued on had been fully executed, and that the chat-  
mortgage set forth in the plaintiff's reply had also been  
y executed; and nothing materially adverse and scarcely  
thing of a material character set up in the defendant's  
wer was admitted by the plaintiff. It was not admitted  
t the property taken by the plaintiff under the chattel  
rtgage was of the value of more than \$200, and it was not  
mitted that any wrong of any kind had been done by the  
ntiff; hence the plaintiff, in the first instance, was not  
ed upon to prove anything, but, on the contrary, the bur-  
of proof rested upon the defendant; and if the defendant  
l failed to introduce any testimony, the verdict and judg-  
nt should unquestionably have been for the plaintiff for  
amount claimed in its petition. The aforesaid instruc-  
a was therefore erroneous, and in our opinion materially  
and for this and other reasons the judgment of the court  
ow will be reversed, and cause remanded for further pro-  
ceedings.

All the Justices concurring.

47	432
65	507
47	432
67	271
47	432
71	458

# D. C. LINDLEY V. THE ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY.

1. TRIAL—*Admissions—Direction of Judgment.* The court is warranted in acting upon the admissions made by parties during the trial of the cause; and where the plaintiff, in making the opening statement of his case to the court and jury, admits or states facts the existence of which absolutely precludes a recovery by him, the court may close the trial at once and give judgment against him.
2. ——— *Opening Statement—Record.* Where such opening statement is not preserved in a bill of exceptions, it forms no part of the record of the district court.

## *Error from Sumner District Court.*

THE opinion contains a sufficient statement of the case.

*W. A. McDonald, and Charles Willsie, for plaintiff in error.*  
*Geo. R. Peck, A. A. Hurd, Robert Dunlap, and O. Wood, for defendant in error.*

The opinion of the court was delivered by

JOHNSTON, J.: D. C. Lindley brought this action against the railroad company to recover damages for personal injury allegedly to have been sustained while traveling on a stock train. The first trial of the case resulted in a verdict in his favor, but proceedings in error were prosecuted, and the judgment of the district court was reversed, and the cause remanded for a new trial. (*Railroad Co. v. Lindley*, 42 Kas. 714.) When the case was called for trial the second time, a jury was impaneled after which the plaintiff by his counsel stated his case to the jury, and the evidence by which he expected to sustain it. He then offered in evidence a deposition which had been taken when the defendant objected to the reading of the same, for the reason that the amended petition did not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant, and for the further reason that the statement made to the jury shows that the plaintiff was guilty

## Opinion of the Court.

such contributory negligence as would preclude a recovery against the defendant. The objection was sustained by the court, and the jury discharged. The plaintiff brings the case upon a transcript of the record, asking a review and a reversal of the ruling of the district court.

The first question presented is, whether the court may dispose of the case upon the statement made by the plaintiff in opening his case. Such a statement is a part of the procedure in the trial. The code provides that, when the jury is sworn, the plaintiff or party who has the burden of proof may proceed to state his case to the jury, and the evidence by which he expects to sustain it. (Civil Code, § 275.) If the statements and admissions then made are such as to absolutely preclude a recovery, it would be useless to consume further time or to prolong the trial. The court is warranted in acting upon the admission of the parties the same as upon the testimony offered; and, as it may sustain a demurrer to the evidence of the plaintiff and give judgment against him, it would seem that when stated or admitted facts which were fatal to a recovery the court might close the case at once. The same question arose in like manner in *Oscanyan v. Arms Co.*, 103 U. S. 251. Justice Field, who pronounced the judgment of the court, stated that—

“The power of the court to act in the disposition of a trial on facts conceded by counsel is as plain as its power to act on the evidence produced. The question in either case must be whether the facts upon which it is called to instruct the jury be clearly established. If a doubt exists as to the statement of counsel, the court will withhold its directions, as where the evidence is conflicting, and leave the matter to the determination of the jury. In the trial of a cause the admissions of counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made or the set-off claimed. Indeed, any fact bearing upon the issues involved, admitted by counsel, may be a ground of the court's procedure, equally as if established by the clearest proof. And if, in the progress of trial, either by such admission or proof, a fact is developed

---

Lindley v. A. T. & S. F. Rld. Co.

---

which must necessarily put an end to the action, the court may, upon its own motion, or that of counsel, act upon it and close the case."

If the statement made to the court and jury by the plaintiff showed beyond dispute that the injuries which he received were the result of his own negligence, he could not recover anything from the defendant, and it would have been idle to have proceeded further with the trial of the cause. It is contended, it is true, that the statement made contained no fact or admission or any statements which justified the action of the court; but, unfortunately for the plaintiff, the statement is not found in the record. It might have been preserved by a bill of exceptions or in a case-made, but neither has been done. There appears to have been an attempt to make the statement a part of the record, as there is attached to what purports to be the statement a certificate made by the official stenographer of the district court. This certificate is unavailing. Such a statement can only be made a part of the record through a bill of exceptions settled and signed by the court, and it is not contended that this has been done. A certificate has been made by the judge that the statement appended to the record is a true and correct transcript of the same; but it is not the province of the judge to authenticate a transcript of record. If the court had allowed a bill of exceptions containing the statement, and made the same a part of the record, it would have been the province of the clerk, and not of the judge, to have authenticated a transcript of the same. It follows that the statement is not before us for consideration, and therefore the ruling and judgment of the district court must be affirmed.

All the Justices concurring.

## NERO COX v. S. A. GRUBB.

47	436
58	903

**PARTNERSHIP**—*Contract by Surviving Partner to Pay Firm Debts.* A contract made between a surviving partner, the widow of a deceased partner, who left minor children, and a part of the individual creditors of the deceased partner, that the surviving partner should pay a proportionate share of the individual indebtedness of the deceased partner, and retain all the partnership property, is against public policy, and is illegal and void.

——— *Void Contract.* A promise made by the surviving partner to a creditor of the deceased partner, in pursuance of such an agreement, to pay such creditor a proportionate share of the individual debt, is illegal and void.

*Error from Bourbon District Court.*

THE material facts appear in the opinion. Judgment for plaintiff, *Grubb*, at the December term, 1888. The defendant, *Cox*, brings the case to this court.

*J. D. McCleverty*, and *O. A. Cheney*, for plaintiff in error.  
*A. A. Harris*, and *Henry E. Harris*, for defendant in error.

Opinion by SIMPSON, C.: The material facts are, that Cox and Ernst were partners, doing a small butcher business in the town of Fulton, in Bourbon county. January 6, 1888, Ernst died intestate, leaving a widow and some minor children. At the death of Ernst the partnership owed no debts, and had on hand tools and stock of the value of several hundred dollars. Individually Ernst was indebted to several creditors, and owed Grubb about \$207, and the only means of payment was the intestate's interest in the partnership property. Shortly after the death of Ernst, an attempt was made to settle up the affairs of his estate without having administration thereon, and for that purpose it was proposed that the said Cox retain the Ernst share of the partnership property, and pay a *pro rata* share to each of the creditors, the said Grubb being one of them; the value of the assets belonging to the estate of the said Ernst being found to amount to



## Cox v. Grubb.

about 50 cents upon the dollar of his debts. To this the widow of Ernst, a partial meeting of the creditors, and the said Cox, all assented. The amount due Grubb by Ernst was \$206.60, and this suit was for such *pro rata* amount, or one-half. The defendant, Cox, made the promise to pay this *pro rata* amount, believing that if all the creditors assented it could be legally done; but finding there were other creditors, he refused to do so, and did not pay Grubb. After a while an administrator was appointed, who took possession of the assets of the estate of Ernst, and disposed of the same by selling to defendant Cox, he accounting for all of the property, including some after-accruing profits, with the administrator. The plaintiff below, Grubb, had judgment, and Cox brings the case here for review, a new trial having been denied.

The questions are: Was the promise of Cox to pay Grubb based upon a valid consideration? and, if so, was it binding, when not in writing, it being conceded that it was in parol only? Another serious question is: Can such a contract be upheld unless the minor heirs are represented, and unless such a disposition of the estate of the deceased person is authorized or ratified by the probate court? The case of *Ravenscraft v. Pratt*, 22 Kas. 20, holds that a sale made by the widow of a deceased partner, who had been appointed administratrix of her husband's estate, to the surviving partner, of all the deceased partner's interest in the partnership, consisting of tanning and the hide and leather business, was illegal and void. In this case the deceased partner left a widow and four children. In the case of *Specht v. Collins*, decided by the supreme court of Texas, and reported in 16 S. W. Rep., 934, it is held that a contract by the husband to convey his deceased wife's land, "as soon as administration is had upon said estate," is void as against public policy, since the husband can neither bind the estate nor the course of administration. The record in this Texas case does not disclose whether there were other heirs, or whether there were debts against the estate of the deceased wife.

---

Opinion of the Court.

---

In the Ravenscraft case the widow was administratrix, and the deceased partner left other heirs. In the Texas case, the surviving husband was the sole heir, but was not the administrator when he made the contract for sale. In this case, the deceased partner left a widow and minor heirs, but at the time his promise was made there was no administration. The cases cited go upon the theory that such a contract is against public policy, for the reasons that the statutes provide a tribunal whose duty it is to supervise the settlement of the estates of all deceased persons, and whose special duty it is to protect the interests of minor children and heirs. No contract can be made respecting the assets of a deceased person's estate except by the authority and with the approval of the probate court, and only when to the extent authorized or permitted by the laws of the state. In the absence of administration, no heir can make a contract that will be binding. No stipulation could be entered into by the widow that would bind the minor heirs in any matter respecting the settlement of the estate or its property or its debts. The law fixes the manner of administration; it imposes certain restrictions upon the sale of the assets of an estate, and even when the sale is authorized by law, and ordered by the probate court, the sale and its terms and its methods are still subject to the approval of the court ordering it. No person interested in the estate can by contract, assent or silence create other methods of selling the assets of the estate than those prescribed by the law. To permit this in any one instance would withdraw all the safeguards and beneficent restrictions that the law imposes for the protection of the interests of minor and non-resident heirs. The widow could not make any contract that would bind the minor heirs; she could make no contract pledging the course of the administration of the law respecting the settlement of the estate of a deceased person. Public policy, the policy of the probate law, and the interests of minor children in the estates of their deceased parents, all forbid such contracts as the one made in this case. This particular contract was illegal, and the promise of Grubb, being a part and parcel of it, was illegal and void.

---

Russell v. Bradley.

---

We recommend that the judgment be reversed, and the cause remanded for further proceedings.

By the Court: It is so ordered.

All the Justices concurring.

---

C. P. RUSSELL *et al.* v. BRADLEY, WHEELER & CO.

1. OWNERSHIP—*Pleading and Proof.* A plaintiff alleging ownership of property at a certain time is not restricted, as to the evidence of such ownership, to the very day fixed in the petition, but may introduce evidence to establish ownership prior to the time stated in the pleading.
2. EVIDENCE—*Verdict.* The evidence considered, and found sufficient to sustain the verdict of the jury.
3. INSTRUCTIONS—*No Exception.* Instructions not excepted to will not be reviewed.

*Error from Sherman District Court.*

THE opinion states the facts. Judgment for plaintiffs, *Bradley, Wheeler & Co.*, at the October term, 1888. The defendants, *Russell* and another, bring the case to this court.

*Brown & Knight*, for plaintiffs in error.

*Bagley & Andrews*, for defendants in error.

Opinion by GREEN, C.: *Bradley, Wheeler & Co.* brought this action in the district court of Sherman county against C. P. and H. W. L. Russell, to recover the value of a frame building which, it was claimed, they had converted to their own use. The case was tried by the court and a jury, and the plaintiffs recovered a judgment for the sum of \$350 against C. P. Russell. The material facts are: *Bradley, Wheeler & Co.* had an agent at Sherman Center by the name of Swayne, who had become indebted to them; and on the 13th day of

August, 1887, he executed to them a mortgage upon some town lots in Sherman Center, upon which stood the frame building in controversy. In the month of December, 1887, Swayne, without the knowledge of the plaintiffs, moved the building from Sherman Center to Goodland. Russell Bros. were engaged in the banking business at the latter place, and were acting as the collecting agents for Bradley, Wheeler & Co. On December 13, 1887, Russell Bros. wrote Bradley, Wheeler & Co. that Swayne had removed a part of his building to Goodland. In reply to this letter, Bradley, Wheeler & Co. wrote the following to Russell Bros., under date of December 16, 1887:

"We mailed you last week a mortgage on Swayne's property at Sherman Center, to be exchanged for mortgage on his Goodland property, which he got in exchange for his Sherman Center location, and which he agreed to pay us when he made the change. We hope you will attend to this promptly, and let us have mortgage as soon as possible."

On December 30, 1887, Russell Bros. through their assistant cashier, wrote the following letter to Bradley, Wheeler & Co.:

RUSSELL BROS., BANKERS.

"GOODLAND, SHERMAN CO., KAS., 12-30-1887.

"*Bradley, Wheeler & Co.—Gentlemen:* Your favor of the 24th inst. received, with inclosure as stated, and same entered for collection. Your mortgage against Swayne we have handed to attorney W. K. Brown for attention. Understand there are some technical difficulties.

Yours respectfully, J. C. F. McKESSON."

On the 3d day of January, 1888, Russell Bros. took a bill of sale of the building in controversy. This bill of sale was filed for record on the 23d day of January following. Russell Bros. also held a real-estate mortgage upon the lot upon which this same building was situated. This mortgage was dated December 16, 1887, and filed in the office of the register of deeds on the same day. On the 23d day of February, 1888, Swayne executed a bill of sale to the plaintiffs below for the same building, describing it as the building upon which

## Russell v. Bradley.

Bradley, Wheeler & Company had a mortgage when it stood in Sherman Center, and was sold by Swayne as a partial settlement for said mortgage. This bill of sale was filed for record on the same day, and Bradley, Wheeler & Company took immediate possession and stored their goods in said building. Sometime after this, Russell Bros., through their agents, took forcible possession of the building in controversy, moved upon one of their own lots, and have since held it.

It is first claimed by the plaintiffs in error that, because the petition alleged that the plaintiffs owned the building in June 1888, it was error to show title to the property in dispute some time prior, in the year 1887. There was no error in this; the court was perfectly competent for the plaintiffs below to establish by competent evidence their title to the building in controversy prior to the time alleged in the petition. It would be too narrow a construction of the pleading to limit the inquiry of ownership to the time alleged in the petition.

It is next urged that there is no evidence that Russell Bros. accepted the agency for Bradley, Wheeler & Co., in looking after its mortgage against Swayne; and that Russell Bros. could not act for the plaintiff below, on account of adverse interests. It was established that Russell Bros. were the collecting agents for Bradley, Wheeler & Co.; that as early as the 9th day of December, 1887, the latter made inquiry of the former concerning their claim against Swayne, and on the 13th of the same month Russell Bros. wrote the company that Swayne had moved a part of his building to the new town which was the county-seat of Sherman county. This was before they had taken their real-estate mortgage. Three days later Bradley, Wheeler & Co. wrote the defendants again, saying they had sent the Swayne mortgage to them the week previous, and urged upon them the necessity of prompt attention. On the 30th day of December they reported to Bradley, Wheeler & Co. that they had handed the mortgage to an attorney for attention, saying that they understood there were some technical difficulties in the way. This certainly was some evidence to show the relation existing between the pa-

ies. It is not our province to pass upon the weight of evidence; that has already been done by the jury. We think there was some evidence showing that the plaintiffs in error accepted the note and mortgage of defendants in error as their collecting agents, and should have guarded their interest. If they were not in a position to do this, they should have returned the claim at once, and not held it until they attempted to acquire an adverse interest in the very property they knew Bradley, Wheeler & Co. sought to subject to the payment of their debt. The law requires the utmost good faith and loyalty upon the part of the agent in the performance of every duty which he owes to his principal.

The claim is made that the instructions of the court were misleading. No exceptions were taken to the charge of the court, or any portion of it.

Our attention is called to the fact that the district court entered judgment against H. W. L. Russell, when the record shows that no service was made upon him and no appearance or answer was filed in his behalf. The record was modified on this particular, as appears from a corrected journal entry on file in this court, from which it appears that the judgment is only against C. P. Russell.

We recommend that the judgment be affirmed.

By the Court: It is so ordered.

All the Justices concurring.

---

 Marshall v. Bacheldor.
 

---

EDWARD MARSHALL *et al.* v. L. S. BACHELDOR.

1. **PERSONAL PROPERTY, Affixed to Realty—Status.** In the sale of personal property that is to be affixed to realty, the contracting parties at the time of the sale have the power, as between themselves, at least, to fix the *status* of such property, and to say whether, when affixed to the realty of the vendee, it shall remain personal property or become a part of such realty.
2. **HOMESTEAD—Not an Improvement.** By the express terms of the contract of sale of the property for which the debt sought to be enforced in this case was created, the ownership and possession of the property sold was to remain in H. until the price was paid. *Hollis*. That under such contract, as between H. and B., the property sold, though it subsequently became affixed to the homestead of B., remained personal property, and did not constitute an improvement upon the homestead; and the latter was exempt from sale to pay the debt contracted therefor.

*Error from Cloud District Court.*

**INJUNCTION.** Judgment for plaintiff, *Bacheldor*, at the October term, 1888. The defendants, *Marshall*, as sheriff of Cloud county, and *Hollis*, bring the case to this court. The material facts appear in the opinion.

*Kennett, Peck & Matson*, for plaintiff in error.

*Theodore Laing*, for defendant in error.

Opinion by STRANG, C.: Sometime prior to March 1, 1888, S. M. Hollis sold to L. S. Bacheldor a windmill and grinder and also a wheel and chain to connect said windmill and grinder and transmit power from the former to operate the latter, for the purpose of grinding feed for stock. At the time of the sale, the said Hollis took from Bacheldor his promissory note for said property, in which he reserved to himself the ownership and possession of said property until the purchase-money should be paid, together with the right to retake the actual possession of said property at any time he should deem himself insecure. The windmill, grinder, wheel and chain were set up and used on the homestead of the defendant. The

## Opinion of the Court.

Windmill was placed on a tower which was bolted fast to posts into the ground. The grinder was screwed fast to the floor of a small shed erected over it for shelter. The notes were not paid when due. Hollis brought suit thereon and obtained judgment against Bacheldor March 14, 1887, for \$250. October 13, 1887, an execution was issued on said judgment and levied upon the homestead of Bacheldor for the purpose of selling the same to satisfy the judgment. November 3, this suit was begun in the district court of Cloud county, to enjoin the sale of said homestead, upon the ground that it was exempt. An answer was filed admitting that the premises were the homestead of Bacheldor, but alleging that the debt upon which the judgment rested was contracted for improvements upon said homestead, and that the exemption laws of the state did not therefore protect the homestead. The injunction was allowed, and on trial made perpetual. Motion for new trial was overruled, and a case made for this court.

The only question in the case is, was the debt, for the payment of which the Bacheldor homestead was being sold, contracted for improvements thereon? If it was, the judgment of the court below was wrong, and ought to be reversed; but if such debt was not for improvements on said homestead, the judgment is right and must stand. The property for which the debt in question was contracted was, at the time of the sale, personal property. If it ever became a part of the realty, and therefore an improvement thereon, it was by reason of its becoming attached to such realty after the sale. Whether personal property affixed to realty becomes a part thereof depends, as a general rule, upon the character of its attachment to the realty, or the use to which it is put. If it is attached to the realty so as to be incapable of separation therefrom without serious injury to the latter, it will generally be considered a part of the realty. Or if it is affixed to the realty to be used permanently in connection therewith as a part thereof, it will generally be considered a part of the realty. (*Walker v. Sherman*, 20 Wend. 636, and cases there cited.) One of the property sold by Hollis was so attached to the



---

Marshall v. Bacheldor.

---

realty of Bacheldor as to be incapable of severance and removal therefrom without injury to the realty; nor was attachment to the realty necessary to the use and enjoyment of the homestead of Bacheldor. It was used to grind feed for himself and neighbors for profit, outside of any necessary connection with the freehold. But whether in this case, under the general rule, the property would be considered a part of the realty or not, we do not think that, under the contract between Hollis and Bacheldor, the property sold by the former to the latter became a part of his real estate.

In the sale of personal property that is to be fixed to realty, the contracting parties at the time of the sale have the power, as between themselves at least, to fix the *status* of such property, and to say whether, when affixed to the realty of the vendee, it shall remain personal property or become a part of the realty. (*Fortman v. Geopner*, 14 Ohio St. 558; 1 Ben. Sales, § 425; Tied., Sales, §§ 83, 85.) Did the contracting parties, at the time of the sale in this case, fix the *status* of the property for which the debt sought to be enjoined was contracted? We think they did; and in such a manner as to leave the property on the premises of Bacheldor not only as personal property, but the property of Hollis, the venditor, until the performance of the condition by payment of the purchase-price. When the mill, grinder and other articles were sold by Hollis to Bacheldor, the former reserved in himself both the ownership and possession thereof in himself until the price was paid; and also reserved to himself the right to take the actual possession of said property whenever, before payment, he deemed himself insecure. That is, if at any time before payment Hollis, for any cause, thought he was in danger of losing his property, he had the right to go to Bacheldor's place and take it away. So long as this right remained in Mr. Hollis by express contract between himself and Bacheldor, the property, as between themselves at least, could not become a part of the realty, and could not be held to constitute an improvement thereon. If said property did not constitute an improvement upon the realty, the homestead would

Dryden v. C. K. & N. Ry. Co.

exempt from the payment of the debt contracted therefor, and the sale of the homestead to satisfy such debt should be enjoined. (*Eaves v. Estes*, 10 Kas. 314; *A. T. & S. F. Rld. Co. v. Morgan*, 42 id. 23; *Ford v. Cobb*, 20 N. Y. 344; *Holmes v. Temper*, 20 Johns. 29.)

We therefore recommend that the judgment of the district court be affirmed.

By the Court: It is so ordered.

All the Justices concurring.

ABRAHAM L. DRYDEN, as *Administratrix of the estate of James E. Dryden, deceased*, v. THE CHICAGO, KANSAS & NEBRASKA RAILWAY COMPANY.

NEW TRIAL — *Motions Overruled* — *No Review, When*. When errors complained of relate to matters occurring on the trial, for which a new trial is asked, but the action of the court in overruling the motion for a new trial is not assigned as error, they cannot be considered in this court. (*Struthers v. Fuller*, 45 Kas. 735, cited and followed.)

*Error from Doniphan District Court.*

THE facts sufficiently appear in the opinion.

*Grant W. Harrington*, and *W. D. Webb*, for plaintiff in error.

*M. A. Low*, and *W. F. Evans*, for defendant in error.

Opinion by SIMPSON, C.: On the 22d day of December, 1886, one James E. Dryden, who lived about three miles east of the city of Troy, in Doniphan county, was driving east from his home, early in the forenoon of a cold, frosty day, in a buggy drawn by two horses, and in attempting to cross the track of the Chicago, Kansas & Nebraska Railway Company, in the advance of an approaching train, was killed. He had lived

47 445

47 450

47	445
73	759

---

Dryden v. C. K. & N. Ry. Co.

---

near the crossing for many years, and the railroad had been in operation for several weeks. The top of his buggy was up, and he was driving in a brisk trot. The railroad extended east and west at the crossing. The wagon road, on which the deceased was traveling, ran north and south at this place, and crossed the railroad track at right angles, but before approaching the crossing from the north, and at a short distance from the crossing, the road ran west, parallel with and about 100 feet north of the railroad track for several miles. The public road, after crossing the track of the railroad from the north, ran south for about 400 feet, and then turned and extended to the east. The deceased was driving along the road from the west until he came to the turn, and then went south for about 100 feet onto the track where he was killed. The railroad track at a distance of 50 or 60 feet west of the crossing was constructed upon a very light grade, but about 300 feet west of the crossing there was a cut from 2 to 11 feet deep, and probably 200 feet long, and west of this, and about 1,300 feet from the crossing, was a bridge 54 feet long. As the crossing is approached from the west, and before the road turns south, the ground is high and hilly, and the approaching train could be plainly seen from the top of the hill for 120 rods. As the crossing is approached from the west, and before the turn is made to the south, the ground between the road and track is comparatively level; when the turn is made on the road going south to the crossing the grade is slightly down hill until near the crossing, and to the west of the road, after the turn south is made, the view of the track west is somewhat obscured by weeds and elder bushes along the side of the fence and on the right-of-way. Dryden approached probably within 40 feet of the track at the crossing, when he leaned forward and looked in the direction of the approaching train. He then struck the horses with the whip and endeavored to cross the track before the train arrived at the crossing. He was struck by the train and killed. There is evidence tending strongly to show that while the train was in the cut west of the crossing, and probably 150 feet away, the whistle sounded the usual danger

## Opinion of the Court.

signals. A fair summing up of the evidence shows that the deceased was driving along the road from the west at a brisk trot, and not until he turned south toward the crossing, and had advanced to within 40 or 50 feet of the track, did he pay any attention to the approaching train. At the latter point, something caused him to lean forward and look in the direction it was coming. He then whipped his horses, increased their speed, and tried to cross in advance of the arrival of the train. He lived within a half-mile of the crossing, his house being within 160 feet of the track of the railroad. The train that struck him was a regular train and on time.

This action was brought by his wife, as administratrix, to recover damages for the negligent killing at a public crossing. At the trial the court instructed the jury in these words:

"It is deemed by the court that the evidence in this case shows that the deceased, James E. Dryden, did not use ordinary care in crossing the railroad of defendant, and under the law is not entitled to a verdict for the injury done. You are, therefore, instructed to find for the defendant."

The jury returned a verdict for the defendant, and the administratrix brings the case here for review. The principal error complained of is the instruction above given; but as this error of law occurring at the trial, and as the overruling of the motion for a new trial is not assigned as error in the petition in error filed in this court, we are without the power to review this cause. This has been held in many cases, from *Carson v. Funk*, 27 Kas. 524, to *Struthers v. Fuller*, 45 id. 735. Every assignment of error in the petition in this case is for errors occurring at the trial, and this ruling we now make on the instruction complained of applies to all the other assignments of error.

We can do nothing but recommend an affirmance of the judgment.

By the Court: It is so ordered.

All the Justices concurring.

47	448
68	781

47	448
73	756
73	759
74	783

47	448
80	438

W. H. COGSHALL *et al.* v. S. W. SPURRY.

1. PETITION IN ERROR—*Amendment, When.* A petition in error in the supreme court may be amended more than one year after the ruling of the district court complained of has taken place, if the amendment is only to make good a defective, informal or incomplete allegation of error already contained in the petition in error; but when the proposed amendment sets forth an absolutely new and distinct allegation of error or cause for reversal, it cannot be made after that time.
2. TRIAL—*Errors, When Considered.* Errors occurring during the trial cannot be considered by the supreme court unless a motion for a new trial, founded upon and including such errors, has been made by the complaining party, and acted upon by the trial court, and its ruling excepted to, and afterward assigned for error in the supreme court.

*Error from Crawford District Court.*

THE case is stated in the opinion.

W. R. Cowley, for plaintiffs in error.

John T. Voss, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: The assignments of error in this case are as follows:

- "1. The said court erred in the instructions given to the jury on the trial of the said action.
- "2. The court erred in admitting evidence in the trial of said action.
- "3. The verdict was contrary to the evidence.
- "4. The said judgment was given for the said S. W. Spurry when it ought to have been given for these plaintiffs."

It will be seen that nothing is said in the assignments of error with regard to a motion for a new trial. There was a motion for a new trial, however, made and filed in the court below on April 7, 1888, and overruled on April 20, 1888. The grounds for the motion are as follows:

- "1. The verdict is contrary to and against the evidence.

- "2. The verdict is contrary to and against the law.  
"3. Error upon the part of the court in the admission of testimony, to which the plaintiff excepted at the time."

Nothing is said in this motion with respect to the instructions of the court to the jury. Instructions, however, were given; and while we have 17 pages of them in the record, yet the record does not show that it contains all. On the same day on which the motion for the new trial was overruled, judgment was rendered in favor of the defendant, S. W. Spurry, and against the plaintiffs, W. H. Cogshall and George W. Pye, partners as W. H. Cogshall & Co., for costs of suit; and on April 16, 1889, the plaintiffs, as plaintiffs in error, brought the case to this court for review.

On October 8, 1891, the plaintiffs in error asked leave of this court to amend their petition in error so as to make it allege for error the overruling of their motion for a new trial, but the court overruled the motion, and then the case was submitted to the court for final decision upon its merits upon the petition in error as it was and the record and the briefs of counsel. The motion of the plaintiffs in error for leave to amend their petition in error was overruled upon the ground that it was made too late. Under the statutes of this state, (Civil Code, § 556,) no proceeding in error can be commenced in the supreme court unless it is commenced within one year after the rendition of the judgment or the making of the order complained of, except where the plaintiff in error is an infant, of unsound mind, or imprisoned. The motion to amend in the present case was not made until more than three years had elapsed after the ruling of the court below complained of had occurred. Of course a petition in error may be amended more than one year after the ruling complained of has taken place, but the amendment is only to make good a defective, informal or incomplete allegation of error already contained in the petition in error; but when the proposed amendment sets forth an absolutely new and distinct assignment of error or cause for reversal, it cannot be made after that time. Such has been the uniform ruling of this court, and such ruling has been once

---

Cogshall v. Spurry.

---

at least embodied in a written opinion and reported. (*Crawford v. K. C. Ft. S. & G. Rld. Co.*, 45 Kas. 474, 476.)

The defendant in error objects to the consideration of this case for various reasons, among which are the following: The record does not show that it contains all the instructions of the court below to the jury; the motion for a new trial does not present any question with regard to the instructions, and the petition in error does not assign for error the overruling of the motion for a new trial. We think the contention of the defendant in error must be sustained, especially upon the last ground. (*Struthers v. Fuller*, 45 Kas. 735; *Duigenan v. Claus*, 46 id. 275, 276; same case, 26 Pac. Rep. 699, 700, and cases there cited.) It will be observed that the only errors assigned are such as occurred during the trial, and in the case last cited it was decided as follows:

“Errors occurring during the trial cannot be considered by the supreme court unless a motion for a new trial, founded upon and including such errors, has been made by the complaining party, and acted upon by the trial court, and its rulings excepted to, and afterwards assigned for error in the supreme court.” (Syllabus.)

See, also, the case of *Dryden v. C. K. & N. Rly. Co.*, just decided.

No available error having been assigned by the plaintiffs in error, the judgment of the court below will be affirmed.

All the Justices concurring.

J. L. SHELLABARGER *et al.* v. F. J. MOTTIN *et al.*

47	451
54	574
47	451
57	308

**RAUDULENT CONVEYANCE — Attachment — Sufficient Grounds.** Where an insolvent debtor, being pressed by his creditors, executes a chattel mortgage upon his personal property to pay or secure for his attorney \$500, most of which is in consideration of future legal services, such mortgage is an unlawful withdrawal of that which justly belongs to the *bona fide* creditors of the insolvent debtor, and operates to delay and defraud his creditors in the collection of their debts. The execution and delivery of such a mortgage furnish sufficient ground for the issuance of an attachment against him.

*Error from Cloud District Court.*

ATTACHMENT suits against *Mottin* and another, by the following plaintiffs, to wit: *J. L. Shellabarger, et al.*, Wm. Broadhead *et al.*, Tootle, Hosea & Co., (two cases,) J. H. Lee & Co., Wm. E. Schmertz & Co., and Phelps, Dodge & Palmer Company. At the April term, 1889, all the attachments were dismissed on defendants' motion, and plaintiffs in each case come to this court. The facts are stated in the opinion.

*Jetmore & Jetmore*, for plaintiffs in error.

*Theodore Laing*, for defendants in error.

The opinion of the court was delivered by

HORTON, C. J.: From December 8, 1887, to March 23, 1889, F. J. Mottin and Ferd. Mottin, partners as Mottin Bros., were engaged in the general merchandise business at Clyde, in Cloud county, in this state. At the time of commencing business the Mottin Bros. were worth from \$15,000 to \$21,000. About midnight of Friday, March 22, 1889, being insolvent, they made a general assignment to C. W. Van DeMark. The assignment was dated March 23, 1889. It included their stock of goods, etc., furniture, fixtures, real estate and equities of both partners, not exempt by law. The sworn schedule of liabilities showed a firm or partnership indebtedness of \$12,524.94. At the time, F. J. Mottin had



debts secured by mortgages upon his individual estate of \$6,884. On March 21, 1889, they executed to the Van De Mark Bros. a chattel mortgage of \$584.70 upon their stock of goods. On March 22, 1889, they also gave another chattel mortgage for \$500 to the Van DeMark Bros. covering their entire stock. This was given to secure a note for attorney fees. On April 8 and 9, 1889, various creditors of the Mottin Bros. commenced actions against them for large sums of money alleged to be due, and attachments were also issued in all of these actions against the property of the defendants. Their stock, furniture, fixtures, etc., were attached, and appraised at \$9,991.51. All of the foregoing cases involve the same questions, and therefore are considered together.

The affidavits for attachments alleged, among other things, that—

“Said defendants, F. J. Mottin and Ferd. Mottin, partners as Mottin Bros., were about to assign, remove and dispose of their property, or a part thereof, with the intent to defraud, hinder and delay their creditors, and had assigned, removed and disposed of their property, or a part thereof, with the intent to defraud, hinder and delay their creditors, and fraudulently contracted the debt and incurred the liability and obligation for which the actions were brought.”

The Mottin Bros. filed their motion to vacate and dismiss the attachment proceedings, principally for the reason that the grounds for the attachments alleged in the affidavits were not true. The motion to vacate and dismiss the attachment proceedings was heard at the April term of the court for 1889, and, after hearing the evidence and arguments in the cases, the motion was sustained, and all of the attachments were vacated and dismissed. The plaintiffs below excepted, and complain of the rulings of the court below.

Various errors are alleged, but we need refer to one only. The chattel mortgage dated March 22, 1889, for \$500, was not executed until the Mottin Bros. had determined to make an assignment of their property, and was executed at about the same time. The Van DeMark Bros. agreed to secure

## Opinion of the Court.

Theodore Laing, as the attorney for the Mottin Bros., and they agreed to become responsible to him for his advice, services, etc., as the attorney for them. Ferd. Mottin stated, among other things, as follows:

"That Laing was employed by the Van DeMark Bros. as attorney for him and his brother; that he thought he would need legal advice before he got through the assignment."

C. W. Van DeMark testified as follows:

"Ques. For what was the note and mortgage of \$500 given by Mottin Bros. to Van DeMark Bros.? Ans. Well, I can explain the whole thing. I don't like to answer in any other way.

"Q. Go on. A. Mottin Bros. came to me and spoke about their difficulties—bills coming due and trade being slack; and they didn't see how they were going to meet their bills; didn't see what they were going to do, and thought they would probably have trouble with some of their creditors when their bills came due; and was consulting me frequently about it. I told them that I didn't feel competent to give them advice about it; that they had better see some attorney that could advise them better than I could in the matter, and they said they wasn't acquainted with any, and I mentioned the names of several parties in Concordia, attorneys, and I mentioned Mr. Laing's name, and they wanted I should go and see Mr. Laing for them and employ him as counsel in these matters, or in any other matters that might come up. I went to Concordia and saw Mr. Laing and told him what they wanted, and told him about their condition so far as I knew that they were in; that they hadn't got any money at that time. Mr. Laing told me that if Van DeMark Bros. would guarantee the fee it would be all right; told me how much he would want as their attorney in any matters that might come up in relation to their business.

"Q. What sum did he name? A. \$500. I then went back and told Mr. Mottin what Mr. Laing had said, and that I would guarantee this providing that they would give Van DeMark Bros. a mortgage for security, but that we wouldn't guarantee it without some security, and the note and mortgage were given for that purpose.

"Q. Did you notify Mr. Laing of the result and let him know that he was employed under those circumstances? A. I did."

---

Shellabarger v. Mottin.

---

Theodore Laing testified that "the fee was taken in full payment of all their services to Mottin Bros. in all of the business they had, and anything that might come up in which they were affected." It therefore clearly appears from the evidence that the mortgage of \$500 which was given for attorney's fee was partly for future services; that is, the mortgage was for services part of which, and most of which, according to the evidence, were to be rendered in the future. Therefore, while the Mottin Bros. were in an insolvent condition, they created, or attempted to create, a new debt for something to be performed in the future, and tried to pay it with property which should have been devoted to the payment of their debts then existing. This mortgage therefore cannot be sustained, and the making of this mortgage furnished ground for the issuance of the attachments. It would be a fraud upon creditors to permit an insolvent debtor to place his property beyond their reach by transferring or conveying it to an attorney, or to some one for the benefit of the attorney, for future legal services, to be rendered in whatever litigation the debtor might thereafter be engaged. (*National Bank v. Croco*, 46 Kas. 629; *Crain v. Gould*, 46 Ill. 294; *Hill v. Agnew*, 12 Fed. Rep. 230; *Nichols v. McEwen*, 17 N. Y. 22.) The mortgagors and the mortgagees were fully acquainted with the purpose of the mortgage, and were involved, as well as the attorney, in the scheme to contract for future legal services and to transfer sufficient property from the Mottin Bros., just about the time of the making of the assignment, to pay for such future services. There were no innocent parties in this transaction. The assignee, C. W. Van DeMark, did not join in the motion to vacate the attachments, or ask for the discharge of the stock, etc., from the attachments; therefore, all that is before us for decision is the error of the court in vacating the attachments against the Mottin Bros. The orders vacating and setting aside the attachments in all of the above cases will be reversed, and the cases will be remanded, with direction to the district

Fraudulent  
conveyance—  
attachment—  
sufficient  
grounds.

ourt to reinstate the cases and to overrule the several motions vacate and dismiss.

All the Justices concurring.

---

### THE STATE BANK OF CLYDE V. F. J. MOTTIN *et al.*

**ATTACHMENT by Chattel Mortgagor.** A creditor holding a chattel mortgage, as security for his debt, upon property belonging to the debtor, can maintain an attachment against the same and other property of the debtor.

——— **Partial Discharge.** But if such a chattel mortgage is ample security to pay the creditor's claim in full, together with the interest and costs, the district court, or judge thereof, may, upon proper application therefor, discharge so much of the property not included in the chattel mortgage as is not necessary to satisfy the claim of the creditor.

#### *Error from Cloud District Court.*

THE opinion states the facts.

*Pulsifer & Alexander*, for plaintiff in error.

*Theodore Laing*, for defendants in error.

he opinion of the court was delivered by

HORTON, C. J.: The questions involved in this case are similar to those just decided in *J. L. Shellabarger et al. v. F. Mottin et al.*, with one exception. In this case it is alleged that the State Bank of Clyde had, at the time of the issuance of its attachment, a chattel mortgage on the stock of goods of the Mottin Bros., worth \$9,991.51, to secure its debt of \$3,500. Therefore, it is urged, as it had ample security for its claim, it ought not to have an attachment. All of the authorities under statutes similar to our own are to the effect that a creditor holding collateral security for his debt upon property belong-

---

State Bank v. Mottin.

---

ing to the debtor can maintain an attachment against the same and other property of the debtor. (*Gillespie v. Lovell*, 7 Kas. 419; *Deering v. Warren* [S. D.], 44 N. W. Rep. 1068; *Cleverly v. Brackett*, 8 Mass. 150; *National Bank v. Rehm* [Ill.], 18 N. E. Rep. 788; *Drake*, Attach., § 35; *Wade*, Attach., § 19.) The trial court heard this case and the several cases referred to in the opinion of *Shellabarger v. Mottin*, supra, at the same time and upon the same evidence. C. W. Van DeMark, the assignee, was not a party to the motion. It is therefore apparent that the court below vacated and dissolved this attachment, as in the other cases in which there was no chattel mortgage, regardless of the mortgage. If the chattel mortgage executed to the State Bank of Clyde is a valid lien upon the property therein described, and is sufficient security for its debt of \$3,500, interest and costs, then, although for the same reason stated in the opinion referred to, there was ground for the issuing the attachment against the Mottin Bros., C. W. Van DeMark, the assignee, or any other party interested, would be entitled, upon his own motion, to have so much of the property, not embraced in the chattel mortgage, discharged from the attachment as is not needed for the payment of the claim. It was said in *Gillespie v. Lovell*, supra, that "it can hardly be supposed that the law intends to give the plaintiff a double security."

The order of the district court will be reversed, and the case remanded for further proceedings in accordance with the views herein expressed.

All the Justices concurring.

THE MISSOURI PACIFIC RAILWAY COMPANY V. WILLIAM  
GANO.

47	457
67	401
47	457
e81	820

**EJECTMENT, Does not Lie.** Where an owner of land enters into a parol contract with a railroad company authorizing it to take the possession of a portion of his land for a right-of-way and to construct its railroad across the same, for which the railroad company agrees to pay him \$75, and the railroad company, with the knowledge and consent of the owner, takes the possession of the property and constructs its railroad across the same, but does not pay him the \$75 nor any part thereof, the owner cannot then maintain an action in the nature of ejectment to evict the railroad company from the premises and to prevent it from using its railroad, but his remedy is an action for the \$75.

*Error from Miami District Court.*

**EJECTMENT.** Judgment for plaintiff, *Gano*, at the October term, 1888. The defendant *Company* comes to this court. The facts appear in the opinion.

*W. A. Johnson*, for plaintiff in error.

*Sperry Baker*, for defendant in error.

The opinion of the court was delivered by

**VALENTINE, J.:** This was an action in the nature of ejectment, brought in the district court of Miami county on April 2, 1887, by William Gano against the Missouri Pacific Railway Company, to recover the possession of a small strip of land in the southeast corner of out-lot No. 7, in Snyder's addition to the city of Paola, which strip of land was and is used by the railway company as a portion of its right-of-way. The defendant answered, setting forth in substance—first, a general denial; second, that in 1879 the St. Louis, Kansas & Arizona Railway Company was engaged in the construction of its line of railway through the city of Paola, and westerly; that with the full knowledge and consent of the plaintiff, and with the honest belief on the part of the railway company that it had the right to do so, it took the possession of the

strip of land in controversy and constructed its line of railway over the same; that after so constructing its railway, and in 1880, it was consolidated with other railway companies and became a part of the Missouri Pacific Railway Company, and that ever since the construction of the railway in 1879 the railway has been used and operated by the two railway companies in succession, first, by the St. Louis, Kansas & Arizona Railway Company, and second, by its successor in interest, the Missouri Pacific Railway Company, with the full knowledge of the plaintiff and with a full recognition on his part of the right of each of such companies to do so. The plaintiff replied to this answer by filing a general denial. The case was tried upon these pleadings before the court and a jury, and the jury rendered a general verdict in favor of the plaintiff and against the defendant, and also made special findings of fact; and upon this verdict and these findings the court below rendered judgment in favor of the plaintiff and against the defendant, for the eviction of the defendant from the premises; and the defendant, as plaintiff in error, brings the case to this court for review.

It appears that the plaintiff was the original owner of the property in controversy; that in 1879 he entered into a parol contract with the right-of-way agent of the St. Louis, Kansas & Arizona Railway Company to permit it to occupy the premises as and for a right-of-way, and to construct its railway over the same, and the company was to pay him as a consideration therefor \$75. Afterward, with the consent of the plaintiff, the railway company took the possession of the property in controversy, constructed its railway over the same, and then refused to pay the plaintiff the \$75 which it had agreed to pay him, but offered to pay him at first \$10, and afterward \$15, if he would give to it a quitclaim deed for the premises. This he refused to do, and no settlement has yet taken place. In 1880, the Missouri Pacific Railway Company, by the aforesaid consolidation, became the successor in interest of the St. Louis, Kansas & Arizona Railway Company, and the Missouri Pacific Railway Company, with the knowledge of the plaintiff

## Opinion of the Court.

and without any objection from him, has operated the railway across his premises ever since. The plaintiff never demanded of either railway company the property in controversy until he did so by commencing this action, but always claimed the \$75; but he has never received the same nor any part thereof, nor any consideration for his property.

We think the plaintiff has mistaken his remedy. After permitting and inviting the railway company to take the possession of his property and to construct its railway across the same, he cannot now maintain ejectment to evict the railway company from the premises, and to prevent it from using its railway. (2 Woods, Rly. Law, 792; *McAulay v. W. Vt. Rld. Co.*, 33 Vt. 311; *Goodin v. Canal Co.*, 18 Ohio St. 169; *Harlow v. M. H. & O. Rly. Co.*, 41 Mich. 336; *Baker v. C. R. I. P. Rly. Co.*, 57 Mo. 265; *Buchanan v. L. C. & S. W. Rly. Co.*, 71 Ind. 265; *Lane v. Miller*, 27 id. 534; *L. & O. Rld. Co. v. Ormsby*, 7 Dana, 276; *Pettibone v. L. C. & M. Rld. Co.*, 4 Wis. 443.) His action should be for the recovery of the \$75 which the railway company agreed to pay him, with interest and costs, and he could enforce the judgment by a sale of any of the company's property, or perhaps by injunction to prevent the company from operating its railway across his premises until it should pay the amount recovered; or, if both parties have abandoned the original parol contract, which we do not think they have, then the plaintiff could recover his damages by an ordinary condemnation proceeding, or by a regular action having the effect of such a proceeding, instituted for that purpose.

The judgment of the court below will be reversed, and the cause remanded for further proceedings.

All the Justices concurring.



47	460
47	470

THE CHEROKEE & PITTSBURG COAL & MINING COMPANY V. RICHARD WILSON, *as Administrator of the estate of James W. Wilson, deceased.*

1. COAL DUST—*Explosive Element—Judicial Notice.* In an action to recover for injuries resulting from a colliery explosion, the court will not take judicial notice that dry, fine coal dust is a dangerous and explosive element in a coal mine.
2. NEGLIGENCE—*Incompetent Evidence.* Where the negligence alleged was that the defendant company permitted the accumulation of inflammable, combustible and explosive coal dust in the mine, and failed to remove or sprinkle the same, proof that the mine was improperly laid out and constructed, or that proper doors or brattices were not supplied, is incompetent and inadmissible.
3. CONTINUANCE—*Refusal, Error.* There was an agreement between counsel for plaintiff and defendant that the testimony given by certain witnesses in a former case should be transcribed and used as a deposition in the present case, and the party in whose favor the testimony was given relied on the agreement, and did not procure the attendance of the witnesses, but at the trial the testimony of such witnesses, which is material and important, and which, if treated as a deposition taken in this case, would have been competent and admissible, was excluded from consideration upon the objection of the opposing party. The other party then applied for a continuance of the cause on account of the exclusion of the testimony and the inability to otherwise obtain the same, which application was denied. *Held, Error.* Either the testimony should have been received or the continuance granted.
4. ——— *Evidence.* The testimony in the case tending to sustain the charge of negligence as made examined, and *held* to be sufficient to take the case to the jury.

*Error from Crawford District Court.*

THE opinion contains a sufficient statement of the case.

Geo. R. Peck, A. A. Hurd, Robert Dunlap, and O. J. Wood,  
for plaintiff in error.

J. F. McDonald, and Hill & McDonald, for defendant in  
error.

## Opinion of the Court.

the opinion of the court was delivered by

JOHNSTON, J.: Richard Wilson, as administrator of the estate of James W. Wilson, deceased, brings this action against the Cherokee & Pittsburg Coal & Mining Company to recover \$10,000 as damages for the benefit of the parents of the deceased, who are his next of kin and heirs at law, for pecuniary loss alleged to have been sustained by them through the death of James W. Wilson, which was alleged to have been caused by the negligence of the company. James W. Wilson was an employé of the company, working in one of its mines, where there was an explosion on November 9, 1888, by reason of which he was killed. The averments of the petition with reference to the negligence were that—

“The defendant knowingly and wilfully permitted inflammable gases to accumulate therein, and permitted large quantities of coal dust, impregnated with sulphur, to accumulate in the passages thereof, and permitted the same to become dry and inflammable and explosive, and so allowed the same to remain for a long space of time; that by means and reason of the said negligence, carelessness and default of the defendant, an explosion took place in said mine, at about the hour of 5 o'clock P. M. on the 9th day of November, 1888; that said explosion was caused by the negligence of said defendant in negligently permitting the accumulation of combustible and inflammable dust in said mine, which, being communicated with by a blast of powder in the mine, caused a general explosion in the mine; and, among other casualties, caused the death of the plaintiff's intestate, as hereinafter stated; by means and reason whereof the said James W. Wilson was wounded, mangled, bruised, and killed, all without any fault or negligence on the part of the said James W. Wilson, and while he was working in said mine under and by virtue of his said employment; that had it not been for the accumulation of said inflammable and combustible matter in said mine said explosion could not and would not have happened. Said defendant knew, or should have known, in the exercise of ordinary prudence, that the presence and accumulation of said dust was a dangerous element in said mine, but negligently failed to provide reasonable precautions against

danger, by sprinkling said mine or otherwise, or to provide against danger and death by the exercise of any ordinary prudence against permanent injury or death to employes and plaintiff's intestate."

The company answered, denying the allegations of the plaintiff below, and stating that if the deceased was killed at the time and place alleged, his death was caused and materially contributed to by his own negligence. A trial was had in April, 1891, which resulted in a verdict against the company for \$5,000. The company complains of this judgment, and insists that the court erred in its rulings on the admission of testimony, and in determining the sufficiency of the evidence offered to sustain the allegations of the petition, and to uphold the verdict that was rendered. It is also asserted that the court committed error in its charge to the jury, and in its rulings on the special questions of fact submitted to and returned by the jury.

It is shown, and not denied, that on November 9, 1888, a general explosion occurred in a mine owned and operated by the company, known as "Frontenac mine No. 2," and that James W. Wilson and other employes engaged in the service of the company were killed in the explosion. The cause of the explosion is the principal subject of controversy in this action. The mine where the explosion occurred is a dry mine, from which bituminous coal was mined. The main hoisting-shaft, which was used for taking coal out of the mine and as a means of ingress and egress of the miners, as well as to conduct the air into the mine, was about 100 feet deep. At the bottom of the shaft was a main entry, extending east and west a distance of about 2,000 feet. The main east entry extended about 1,100 feet from the shaft, and from it were entries running north and south, which extended from about 200 to 700 feet from the main entry into the coal; and from these entries rooms or drifts were turned, running east and west into the coal. The coal was mined by blasting, and the manner of mining it was by drilling a hole into the face of the coal from two to six feet in depth. After drilling the holes, each miner

---

Opinion of the Court.

---

made his own cartridges, placing as much powder therein as in his judgment was necessary to blow out the coal to the depth of the hole he had drilled. This hole was then tamped or filled with dust, dirt, or clay, or such material as was at hand in the room where the mining was done. These shots or blasts were fired off twice a day, and occurred about noon and five o'clock in the evening of each day. Sometimes the tamping would blow out without breaking the coal. This appears to have been due to improper tamping, or an insufficient quantity of powder, or the manner in which the hole is bored, as well as to the tenacity or solidity of the coal in which the cartridge is placed. When such a shot occurs, the charge shoots directly out of the mouth of the hole, like a shot fired from a gun, and it is known by miners as a "tight, gunning, or blown-out shot." In some cases the flame of these gunning shots would extend a distance of 200 feet from the mouth of the hole. The mining and transportation of the coal through the mine caused considerable coal dust to accumulate in the entries and rooms of the mine, some of which was taken out of the mine by the hoisting-shaft, and to overcome which the mine was sometimes sprinkled.

The theory and claim of the plaintiff below is, that this fine coal dust, which had settled on the walls, floor and ceilings of the mine, and pervaded the atmosphere, was impregnated with sulphur, and was highly inflammable and combustible, and, when combined with the air and the gas liberated from the coal generated by the flame and heat, is a dangerous explosive; that this fine dust was stirred up and ignited by the concussion and flame of a blown-out shot in the third or fourth north entry, and the blast thus started was accelerated and extended by large volumes of dust burning and expanding as it swept through the entire east part of the mine, until it found relief at the mouth of the shaft, and that the coal dust and flame extended up the main shaft and more than 60 feet above the ground on the outside before the force of the explosion was exhausted.

The company contends that the explosion which occurred,

and by reason of which Wilson was killed, was the accidental or careless igniting of a keg of powder by one of the miners, communicated to other kegs in the mine, thereby causing a general explosion throughout the eastern part of the mine, and passing out of the shaft. It is claimed that the mine is well laid out and properly ventilated; that the coal dust in the mine is not dangerous or explosive, and that if it is, the miners were as well aware of the prevalence and dangerous character of coal dust as were the owners or the managers of the mine.

There is testimony offered, though not very satisfactory, tending to show that the coal dust found in the mine is a dangerous explosive, which largely contributed to the disaster that occurred in the mine on November 9, 1888; and further, that the dangerous character of the dust may be destroyed by the sprinkling of the mine, and that those in control of the mine were aware of the dangerous character of the dust, and that an explosion could be prevented by proper sprinkling, which had been occasionally done, but not for some time previous to the explosion.

The defendant in error presents in his brief the opinions and reports of mining inspectors and others who had investigated the question in regard to the explosive character of coal dust, but their testimony was not taken and their opinions and writings were not brought into the case so that they can be

1. Coal dust —  
explosive ele-  
ment — judi-  
cial notice.

considered by court or jury. If coal dust is an explosive, it is not so universally recognized to be such that the court may take notice of the same without proof. The witnesses who testified in this case, as well as the books, show that it is still an open and unsettled question. For this reason, the testimony of the mining superintendents, inspectors and others who have made a special study and examination of the subject would have been of great value to the court and jury in determining this disputed question. As we have stated, the proof offered by the plaintiff below tends to establish his contention; and although it is contradicted by that offered in behalf of the company, and in some respects is not as satisfactory as it should be upon

## Opinion of the Court.

which to base a judgment, we cannot say from an examination of the same that the demurrer to the evidence below was erroneously overruled, or that there was error in not directing verdict in favor of the company. In view of the fact that there must be a reversal and another trial for erroneous rulings, we cannot with propriety enter upon a discussion of the weight or credibility of the evidence, or upon the facts as disclosed in the record now presented in this case. In another trial the testimony may be different, and possibly much fuller and more satisfactory upon the turning-points in the action.

During the course of the trial, the court permitted evidence to go to the jury, over the objection of the plaintiff in error, to the effect that the company had not provided sufficient doors and brattices for the mine. The witnesses Fisher, Wilson and Cox all gave testimony of this character, tending to show that the injury and fatality in the mine were enhanced by the failure of the company to provide suitable doors and brattices between room and room, or between rooms and entries. As

Negligence—  
incompetent  
evidence. the issues were formed, this testimony was unwarranted and prejudicial. It is not claimed or stated in the petition that there was any negligence in laying out, constructing or ventilating the mine. The charge of negligence was, that the company had permitted the accumulation in the mine of dry, inflammable, combustible and explosive coal dust, which it failed to sprinkle or remove, and which, being communicated with by the flame from a powder blast, caused a general explosion. The issue was joined upon this charge of negligence, and it was not subsequently enlarged by any amendment of the pleadings. Proof of negligence with respect to the doors and brattices did not sustain the allegation of negligence that was made, and the admission of the same over the objection of the company was prejudicial error. (*Railway Co. v. Young*, 8 Kas. 658; *Railroad Co. v. Irwin*, 35 id. 86.)

The company undertook to offer the testimony of Williams, Allen and Braidwood in this case, which had been given in the trial of *Limb v. Coal & Mining Co.*, tried at a former term of

the same court. Williams and Allen resided in Pueblo, Colorado, and counsel for both parties in this action went out there to take their depositions, but instead of taking the same, and for the purpose of avoiding the expense incident to the taking of the depositions, and for the convenience of counsel, it was agreed by counsel that the testimony of these witnesses which had been given in the Limb case should be transcribed by the official stenographer of the court, and sworn to by him as being a true and correct transcript of the testimony of the witnesses, and when so transcribed and sworn to it should be used in all other cases against the company pending in that court, to the same extent and with like effect, and to be treated as the depositions of said witnesses, subject to the same objections as though they were present and testifying in court. In pursuance of this agreement, their testimony was transcribed by the official stenographer and duly verified by his oath as being true and correct. Afterward the whole of the testimony was introduced on the trial of the case of Stoop, administrator, against the company, and the testimony was permitted to be read, in accordance with the terms of the agreement made between counsel. When the written testimony of Williams was offered in this case, an objection was made to its competency and relevancy, as well as that no proper foundation had been laid for the question, and because the witness had not shown himself to be an expert. These objections were sustained, except as to some inquiries regarding the map which was used upon the trial. Upon concluding the reading of the testimony in chief, the plaintiff below objected to the reading of the cross-examination, and asked leave to withdraw the same from the consideration of the jury. The company objected to the withdrawal of the cross-examination, but the objection was overruled, and no part of the cross-examination was read except that which referred to the map which had been drawn by the witness. After the court permitted the withdrawal of the cross-examination, and a great part of the testimony of the witnesses Williams and Allen had been excluded from the jury, the defendant made an application for a continuance on

---

Opinion of the Court.

---

account of the absence of the witnesses, and set forth the same by affidavit, reciting that the company had relied upon the agreement made to use this testimony, and for that reason did not have the personal attendance of these witnesses at the court. It is now contended that the court erred in permitting the withdrawal of the cross-examination, and abused its discretion in overruling the application for a continuance.

It appears, from the testimony offered, that Williams was the mining engineer for this coal company, as well as for various others in Colorado, Kansas, and New Mexico; that shortly after the explosion he had visited the mine and investigated the cause and effects of the explosion. He was interrogated with reference to the condition of the mine after the explosion. It appeared that he had been engaged as a mining engineer and in the mining business for about eight years, and had given attention to explosions and the evidence of the same as indicating their cause, but his testimony with respect to the same was excluded from the jury. If he had been present in person and his testimony had been given, or if his deposition had been taken for use in this case, it is clear that the greater part of that which was excluded would have been competent and admissible. Objections to some of the preliminary inquiries may have been properly sustained, for the reason that the competency of the witness to answer the question had not been shown; but before the examination extended very far his competency to testify fully appeared; and if his deposition had been presented embracing the same questions and answers, a part of the examination in chief and the greater part of the cross-examination should have been admitted. If the plaintiff below did not desire to read the cross-examination of the witness which had been agreed should be treated as a deposition, the company should have been permitted to present the same to the jury. Some of the testimony of Allen in regard to his knowledge of the condition of the mine, and of the effects and cause of the explosion, was improperly excluded, providing his testimony is to be treated as a deposition. He was the general manager of the mine, had experience



in mining coal, and had examined the results of the explosion for the purpose of determining its cause. He was, therefore, qualified to testify on these subjects. But considerable of his testimony in respect to the same was excluded from the jury, and objections made by the plaintiff below to questions asked of the witness by himself were sustained by the court, although they were not made at the time the testimony was actually taken. As the testimony of these witnesses and Braidwood was taken for use in another case, probably the court could not compel the reading of the same in this case over the objections of the plaintiff below; but in view of the agreement which had been made, that the testimony should be received and treated as a deposition, and in view of the fact that it had been so treated in another case, their testimony should have been so treated by the court, or else a continuance should have been granted until the presence of the witnesses could be obtained. In view of the circumstances of the case, the company had a right to rely upon the stipulation which had been made, that the testimony of these witnesses, so far as the same was competent as a deposition, would be available in the present case; and as much of the testimony excluded would have been competent and material if treated as a deposition, the rulings of the court in respect to the same were prejudicially erroneous.

For these errors the judgment of the district court must be reversed, and the cause remanded for a new trial.

All the Justices concurring.

3. Continuance—  
refusal, error.

THE CHEROKEE & PITTSBURG COAL & MINING COMPANY V. JOHN LIMB, as Administrator of the estate of Daniel Limb, deceased.

**MASTER AND SERVANT—Death by Wrongful Act—Action by Parents—Excessive Verdict.** In an action brought for the benefit of the parents, as next of kin, to recover for the alleged negligent killing of their son, who was grown up, of full age, and living apart from them, but was unmarried, no proof was offered of the parents' financial condition, or that they had ever received any actual pecuniary benefits from the son during his life-time; nor was there any evidence showing a reasonable probability of pecuniary advantage to them from the continuance of the son's life. *Held*, That a verdict awarding them \$1,500 as damages was excessive, and that under such evidence no more than nominal damages were recoverable.

**EVIDENCE—Jury.** The evidence of negligence produced upon the trial examined, and *held* to be sufficient to warrant the court in submitting the case to the jury.

*Error from Crawford District Court.*

THE material facts are stated in the opinion. Judgment for plaintiff, *Limb*, at the July term, 1890. The defendant company brings the case to this court.

*Geo. R. Peck, A. A. Hurd, Robert Dunlap, and O. J. Wood,* for plaintiff in error.

*J. F. McDonald and W. R. Biddle* for defendant in error.

The opinion of the court was delivered by

**JOHNSTON, J.:** An explosion occurred on November 9, 1888, in Frontenac mine No. 2, owned and operated by the Cherokee & Pittsburg Coal & Mining Company, whereby Daniel Limb, an employé of the company, was killed. He was an unmarried man, and left surviving him David Limb and Hannah Limb, his parents, next of kin and heirs at law. His action was brought by John Limb, as administrator of the estate of Daniel Limb, deceased, against the company, for the benefit of his parents, to recover damages for the pecun-

47	469
47	465
47	469
62	687
47	469
71	529

47	469
73	254
74	323

47	469
70	583

iary loss which they sustained by his death. It was alleged in the petition that the death was caused by the negligence of the company in permitting the accumulation in the mine of dry, inflammable, combustible and explosive coal dust, which was communicated with by a blast of powder, causing a general explosion and the killing of Limb, who was at work in the mine, and who was then in the exercise of due care. The company denied the allegations of the petition, and contended that Limb's death was caused and materially contributed to by his own negligence. The trial resulted in a verdict in favor of the plaintiff below for \$1,500. At the trial testimony was given tending to show that dry coal dust is a dangerous and explosive element in a mine, and that the danger may be allayed by properly sprinkling the mine with water. Some testimony was offered which tended to show that the persons in charge of the mine were aware of the dangerous character of the dust, and had sprinkled the mine to some extent, but had not done so sufficiently to prevent the explosion. The testimony of the company was in direct conflict with that produced by the plaintiff below, and tended to show that coal dust is not an explosive, and that the company and its managers were not negligent, as charged, and that the injury and accident were caused by the explosion of large quantities of gunpowder, carelessly ignited by Limb or some other of the miners. The explosion which caused the death of Daniel Limb is the one referred to in the case of the *Cherokee & Pittsburg Coal & Mining Company v. Richard Wilson*, administrator, etc., just decided. The testimony respecting the condition of the mine, the explosion, its origin and effects, and the knowledge of the company in regard to the dangerous character of coal dust, and what was necessary to overcome the danger, and also in regard to its want of care, is substantially the same as in the Wilson case. It was there held that the testimony, though not full or satisfactory, was sufficient to take the case to the jury; and it must be so held in this case. Hence it cannot be held that the court erred in overruling the demurrer to the evidence of plaintiff below, or

2. Evidence—  
Jury.

## Opinion of the Court.

n failing to direct a verdict in favor of the company. Several errors are assigned on the admission and rejection of testimony. It is unnecessary to make special reference to these. We have examined them with care and find that the exceptions cannot be sustained.

It is contended that the verdict is excessive, and unsupported by testimony showing that the next of kin sustained pecuniary loss by the death of Daniel Limb. In this respect there is a fatal lack of testimony. It is not shown that the parents of the deceased ever received any support from him, nor that they were dependent upon him to any extent for support or assistance. Neither is there any evidence in the record to show their pecuniary condition. There is testimony showing that he was a robust man, who at the time of his death was capable of earning \$80 per month, and one witness stated that he contributed to the support of his parents, but this statement turned out to be hearsay only, and no competent proof was offered that he ever contributed to their support, nor that the continuance of his life would have been of any pecuniary benefit to them. A witness stated that at one time the deceased borrowed \$20 in order to make up a \$100 sum which he proposed to send to his father, in Ohio, and that an order for that amount was inclosed in a letter addressed to his father, but the witness did not know whether the letter was ever mailed or sent to the father, or whether the father ever received the letter, and the defendant in error did not undertake to supply this necessary proof. This is an action for compensation only, and no damages can be recovered by the plaintiff below except for the pecuniary loss which the parents sustained by the death of the son. The burden was on the administrator to show that loss occurred. If there was no evidence that his life had been of actual benefit to the parents, or that any benefits might be reasonably expected by the continuance of his life, then no more than nominal damages could be recovered. (*Railroad Co. v. Weber*, 33 Kas. 543.) There must have been evidence either of actual benefits or those in expectation

Master and  
servant—death  
by wrongful  
act—action by  
parents—ex-  
cessive ver-  
dict.

before the jury can give substantial damages; and an attempt to assess such damages without proof would be to indulge in mere conjecture, which is not permissible. If the son had contributed anything in the past, there would be grounds for the expectation that he would have continued to contribute in the future; or if the son was a minor, the parents would have a legal right to the services of the son during his minority; but after majority, no such legal right exists, and the benefits thereafter would depend upon the capability of the son and his disposition to confer benefits on his parents. It is not shown that Daniel Limb was a minor, but it appears that he lived apart from his parents, was of full age, grown up, and capable of earning fair wages. The right of the parents to recover in such a case, and the nature of the proof required, was quite fully discussed by Mr. Justice BREWER in *Railway Co. v. Brown*, 26 Kas. 443. It was there said:

“It is not the loss of the decedent, but the loss of the survivors, which is to be estimated. That involves not merely the probable accumulations of the deceased, but the probability of the benefit of such accumulations inuring to the survivors. Where one who was the head of a family with minor children is killed, there is a reasonable certainty that his earnings if he had survived would inure directly to the benefit of the widow and children. When one dies without wife or child, with no one legally dependent upon him, and with only remote relatives as his next of kin, there is only a remote probability that his earnings, whatever they may be, would inure to such next of kin. . . . Where the deceased, leaving no wife nor child, leaves as his next of kin father or mother, and such father or mother is in good pecuniary condition, it is fair to say that his life would if survived have been of comparatively little value to them. In other words, his earnings would be used for his own pleasure or profit, and not go to the increase of their present good financial condition.”

Whether the parents of the deceased are wealthy or dependent, or whether they were in the habit of conferring upon or receiving benefits from the deceased, does not appear. For all that is shown, they may be in good financial condition, without any necessity of help from their son, or any likeli-

good of pecuniary advantage by his continued existence. If they had received any portion of his earnings, or if there was any reasonable probability of pecuniary benefit from the continuance of their son's life in the future, it could easily have been shown. In the absence of proof showing that the parents suffered a pecuniary loss by the death of their son, the allowance made in the verdict is clearly excessive. For this error there must be a reversal of the judgment, and a new trial.

Judgment accordingly.

All the Justices concurring.

JAMES A. HILLYER *et al.* v. A. A. BIGLOW *et al.*

47	473
81	548

**ATTACHMENT—Waiver of Irregularities.** In an action on an account not due, the defendants made a general appearance, and filed a motion to dissolve the attachment, for the reason that the grounds set forth in the affidavit for the attachment were false. This motion was overruled, and the facts necessary to give jurisdiction in such actions thereby established. In the motion to dissolve the attachment, no irregularity in the issue and service of the order of attachment was stated or insisted upon. *Held*, That all questions of irregularity were waived.

*Error from Barton District Court.*

THE nature of the action and the material facts appear in the opinion.

*Hopkins & Hoskinson*, and *W. B. Lowrance*, for plaintiffs in error.

*Willey L. Brown*, for defendants in error.

Opinion by SIMPSON, C.: Biglow Bros. brought an action in the district court of Finney county on the 23d day of June, 1886, on an account against Hillyer & Green and their assignee, Gibson. The action was commenced before the debt

---

Hillyer v. Biglow.

---

was due, and an attachment was sought under § 230 of the code. On the 28th day of June, an affidavit for attachment was filed, and a *præcipe* for a summons, and on that day a summons was issued, and returned on July 2d, served personally. On the 28th day of June, 1886, an undertaking in attachment was filed and approved by the probate judge of Finney county, and there was also filed with the probate judge an affidavit for an attachment. The clerk of the district court of Finney county issued an order of attachment on the 28th day of June, 1886, and on the same day the probate judge issued an order of attachment in this action. The record shows a service of the order of attachment issued by the probate judge, but it was returned to and filed with the clerk of the district court. On the 21st day of July, 1886, Hillyer & Green and Gibson filed a motion to dissolve the attachment, for the reasons that the allegations in the affidavit are not true; that they have not assigned or disposed of, nor are they about to dispose of their property, or any part thereof, with intent to defraud, hinder or delay their creditors; and that they have not sold, conveyed or otherwise disposed of their property, with the fraudulent intent to cheat or defraud, hinder or delay their creditors in the collection of their debts; and that said deed of assignment to Gibson was and is not fraudulent; that no attachment bond, as required by law, had been filed at the time the order of attachment was issued; that no order of attachment, as required by law, had been issued; that the order granting an attachment was made by the district court of Finney county, and not by the judge thereof, or the probate judge of Finney county. When this motion was heard at chambers by the judge of that judicial district, the plaintiffs below, by agreement of parties, were granted leave to amend their affidavit for attachment so as to show that the judge of the district court was absent from Finney county when said affidavit was made, and it was amended so as to read that —

“Said Hillyer & Green have assigned, removed and disposed of, and are about to dispose of their property, with the intent to hinder, delay and defraud their creditors, and that

## Opinion of the Court.

Hillyer & Green have sold, conveyed and otherwise disposed of their property, with the fraudulent intent to cheat and defraud their creditors, and hinder and delay them in the collection of their debts."

The judge then overruled the motion to dissolve the attachment, but held that the defendants Hillyer & Green could not be heard on the motion to dissolve the attachment. Gibson appeared by his attorneys, entered a general appearance, and was given leave to join in the motion to dissolve. The defendants filed an answer. On the 14th day of May, 1887, during the regular term of the district court of Finney county, by agreement of parties, J. C. Kitchen, who had become the assignee of Hillyer & Green, was substituted as a party, in place of Gibson. On that day Kitchen filed his motion to dissolve the attachment and set aside the levy made under it. On the 2d day of June, 1887, the plaintiffs below applied for change of venue, because the then judge had been of counsel in the cause, and the action was sent to Barton county for further proceedings. On the 29th day of November, 1887, the original papers were filed in the Barton county district court. At the February term, 1888, of the Barton county district court the plaintiffs below filed a motion to strike Kitchen's motion to quash the order of attachment and set aside the levy from the files, on the ground that no leave was obtained to file the same. This motion was sustained. Hillyer & Green and Kitchen then filed a motion to dismiss the cause for the reasons that the court had no jurisdiction to render a judgment; the action was commenced on a debt not then due, and no attachment was ever issued or granted in the case; no affidavit was filed that authorized the issue of an order of attachment, and because no application was ever made to the district judge, or to the probate judge for an order granting a writ of attachment, and because no bond for costs was ever filed. This motion was overruled. At the October term, 1888, of the district court, a jury was waived and the cause tried by the court. The defendants below objected to the introduction of any evidence, because the petition does not state



---

Hillyer v. Biglow.

---

a cause of action. This objection was overruled. The defendants Hillyer & Green then admitted that the account was correct as shown in the petition and exhibits, and that they were indebted as set forth. The plaintiffs below then rested. The defendant Kitchen demurred separately to the evidence, and the plaintiffs asked the court not to render judgment against him, but only to sustain the attachment. Defendants Hillyer & Green demurred separately to the evidence, and this was overruled. Hillyer & Green then offered to read in evidence the file papers, to show that no attachment was ever issued, and for other purposes, and this was objected to, and the objection sustained. Thereupon, on the demand of Hillyer & Green, the trial court made some special findings, as follows:

"The court finds in this case that this action was brought upon a debt not due, and an order of attachment obtained against the property of the defendants Hillyer & Green. And afterward said Hillyer & Green moved to dissolve and discharge the said attachment, which motion was heard at chambers before Hon. J. C. Strang, judge of the sixteenth judicial district, in which said action was originally brought, and that the question of jurisdiction was raised in said motion, and that said motion was overruled, and that this cause was afterward sent to this county and district on change of venue. The court finds that this question of jurisdiction could have been lawfully passed upon by said Strang, judge, at chambers, and that it was so passed upon by him. And the court further finds that the debt is now due, and that the defendants Hillyer & Green are indebted to plaintiffs upon their demand sued on in this action in the sum of \$2,227, and that the question, of the legality of the order of attachment and proceedings thereunder have been fully determined by said Judge Strang, and cannot be again raised upon the trial by this court."

Hillyer & Green then filed a motion to dissolve the attachment, and this was overruled. They then filed a motion for a new trial, and this was overruled, and the court rendered a final judgment against Hillyer & Green for the sum of \$2,227.11 and costs, and adjudged and decreed that the attachment be in all things confirmed and sustained, and made an

## Opinion of the Court.

order for the sale of the attached property, both real and personal, and an application of the proceeds of the sales. To all of the orders and judgment proper exceptions were saved, except that no exceptions were noted to the ruling of the judge made on the 22d day of July, 1886, sustaining the order of attachment. Hillyer & Green bring the case here for review, and strongly insist that various alleged errors should cause a reversal. The errors assigned will be considered in the order stated in the briefs.

I. It is first contended by the attorneys of the plaintiffs in error that the district court of Barton county erred in striking from the files the motion of Kitchen to quash the attachment issued by the probate judge of Finney county. Kitchen, by the agreement of parties, had been made a party, because he had succeeded Gibson as statutory assignee of Hillyer & Green. Gibson had made this same motion when he was assignee, and it was overruled, and such a motion could not be again made and heard without leave of the court. This is familiar practice. The motion of Kitchen was stricken from the files because no such leave had been applied for or granted. There was no error in this ruling.

II. The next four assignments of error are based upon the theory that the order of attachment was absolutely void because issued by the probate judge. The record shows that the clerk of the district court also issued an order of attachment, and both orders of attachment were delivered to the sheriff; but he made his return on the one issued by the probate judge, and this was the only irregularity in the whole proceeding. Hillyer & Green and Kitchen were duly served with process and made a general appearance in the case, and filed a motion to dissolve the attachment, on the ground that all the averments in the affidavit filed for attachment were false. This motion was heard at chambers and overruled, and by this ruling it was established that all the facts necessary to give the court jurisdiction in a case of this kind existed at the time the attachment issued. While such a ruling may not be said to be strictly *res adjudicata*, nevertheless it is uni-

versally held to be the law of the case in which it is made for all the purposes of trial and final determination. In this motion to dissolve the order of attachment, no complaint or allegation is made that it was irregularly issued and served. The jurisdictional facts having been established by the ruling of the first motion to dissolve the attachment, and nothing being claimed in that motion as to the irregularity of the issue and service of the order, it was waived. No exceptions were saved to the ruling of the court on the motion to dissolve, and hence we cannot review that order. The record showing the existence of the jurisdictional facts in cases of this kind, and showing a general appearance of the defendants in the original action, and showing the overruling of a motion to dissolve the attachment, it seems to us that all the other assignments of error are not controlling, as complete jurisdiction had been obtained by the usual process.

We recommend an affirmance of the judgment.

By the Court: It is so ordered.

All the Justices concurring.

---

### JOHN P. JONES v. E. A. ANNIS.

1. **CHATTEL MORTGAGE** — *Mortgages, Deeming Himself Insecure.* Where a chattel mortgage is given to secure a debt, and the mortgagor is to retain the possession of the property until default shall be made in the payment of the debt or until the mortgagee shall deem himself insecure, the mortgagee may afterward take the possession of the mortgaged property whenever default shall be made in the payment of the mortgage debt, or when the mortgagee shall deem himself insecure.
2. **REPLEVIN** — *Cattle, not Covered by Mortgage.* And when the mortgagee takes the possession of the mortgaged property for the above reasons, which property consists of 10 head of cattle, and through a mistake takes two head of cattle not covered by the mortgage instead of two of the mortgaged cattle, and the mortgagor replevies

## Opinion of the Court.

the cattle, *held*, that the mortgagor can maintain the action only for the two cattle not covered by the mortgage.

——— *Measure of Recovery.* Where the mortgagee while in the possession of the cattle disposes of two head thereof, *held*, that the plaintiff in the replevin action cannot recover a judgment absolutely for the value of these two head of cattle as damages, but he is entitled only to have their price or value deducted from the amount of the mortgage debt still remaining due and unpaid.

*SPECIAL QUESTIONS—Refusal, Error.* When a party to an action in a proper manner requests the court to submit to the jury proper special interrogatories to be answered by the jury, the court commits error if it refuses to so submit them.

*Error from Comanche District Court.*

REPLEVIN. Judgment for plaintiff, *Annis*, at the November term, 1888. The defendant, *Jones*, comes to this court. The facts appear in the opinion.

*Ben. Howarth*, and *W. S. Denton*, for plaintiff in error.

*C. O. Blake*, and *Ady, Peters & Nicholson*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action of replevin, brought in the district court of Comanche county, on December 13, 1887, by E. A. Annis against John P. Jones, for the recovery of eight cows and two bulls, of the alleged value in the aggregate of \$455. The defendant answered, interposing a general denial, and also alleging substantially as follows: That all his connection with the cattle was as cashier and agent of the First National Bank of Coldwater, a corporation, and that the bank had the right to the possession of the cattle because of the following alleged facts: On May 12, 1887, Annis executed a promissory note to John P. Jones, cashier aforesaid, for \$148, with interest at the rate of 12 per cent. per annum, due in 60 days after date; and also executed a chattel mortgage to the same party upon the aforesaid cattle,

to secure the aforesaid note; that the chattel mortgage contains, among other stipulations, the following:

"If default shall be made in payment of said sum of money [the mortgage debt] or any part thereof, when the same shall become due and payable, or if said party of the second part [John P. Jones, cashier] shall at any time deem himself insecure, then and thenceforth it shall be lawful for said party of the second part, his executors or assigns or his authorized agents, to take into his possession said goods and chattels wherever the same may be found, and sell the same at public or private sale, and after satisfying the sum of money hereby secured and the interest thereon, and all costs, charges and expenses incurred, out of the proceeds of said sale, he shall return the surplus to the said party of the first part, or his legal representatives."

That the note became due and was not paid, and the defendant and the bank, believing that the bank, as the owner and holder of the mortgage debt, was insecure, did, on November 30, 1887, take the possession of the mortgaged property for the bank. The plaintiff replied by filing a general denial. A trial was had before the court and a jury, and the jury rendered a general verdict in favor of the plaintiff, and assessed his damages at \$77, and judgment was rendered that the plaintiff retain the possession of the cattle and recover the aforesaid damages and costs; and the defendant, as plaintiff in error, brings the case to this court for review.

According to the pleadings and the evidence, the mortgage debt was due and unpaid at the time when the defendant and the bank took the mortgaged property into their possession, and it does not appear that the debt has ever been paid; and these parties believed that the mortgage creditor was insecure, and probably as a fact such insecurity really existed. The mortgage covered all the property taken by the defendant and the bank, except perhaps two, or possibly three, cows; and the plaintiff, Annis, when he replevied the same, obtained the possession of all the property taken except two cows which had previously been disposed of, and he still retains the possession of the replevied property. It would therefore seem that the defendant ought to have recovered a judgment in the

## Opinion of the Court.

action in the alternative for all the replevied property except the two or three cows not covered by the mortgage; or the value of the bank's interest therein, to wit, the amount still remaining due and unpaid on the mortgage, leaving the plaintiff to retain absolutely the two or three cows.

The plaintiff in error, Jones, claims in this court that the court below committed various errors, only a few of which, however, will it be necessary for us to consider. He urges that the court below erred in refusing to give the following, among other instructions, to the jury:

"If you find from the evidence that the defendant detained possession of said property under a chattel mortgage, it will make no difference whether said debt was due or not, if at the time the defendant took possession of said property he believed himself insecure, for in that case he had the right under the mortgage to take possession of said property.

"If, prior to the commencement of this action, the defendant had disposed of any number of the cattle sought to be recovered and it was beyond his power to return the same, then, as to such cattle, your verdict as to such must be for the defendant, unless you further find that he disposed of the same to defeat plaintiff in this action."

It is also claimed that the court below erred in giving the following, among other instructions:

"You may also take into consideration, in determining the damages the plaintiff is entitled to recover, if you find he is entitled to recover at all, the value of the property so taken and detained by the defendant. If you find that any portion of it has been converted to the use and benefit of the defendant, such portion of the property you may find the value of, in determining the damage the plaintiff is entitled to recover."

It is also claimed that the court below erred in refusing to submit to the jury the following, among other special interrogatories:

"1. Did John P. Jones have the possession at the commencement of this suit of all the property described in the plaintiff's affidavit of replevin filed in this suit?"

"4. Was the debt secured by the mortgage from the plain-

---

Jones v. Annis.

---

tiff to John P. Jones, cashier, paid at the time the suit was instituted?

"5. If you find for the plaintiff as to damages, how much do you find for the two cows that were slaughtered before the suit was instituted? State separately the value of each cow so slaughtered."

We would think the court below erred, substantially, as claimed by the plaintiff in error. The defendant in error, Annis, who was plaintiff below, attempted by his evidence to make it appear that the mortgage debt was not due when Jones and the bank took possession of the mortgaged property. We think, however, he failed; but upon the theory that he did not fail, then it devolved upon the defendant, Jones, and the bank to show that they believed themselves to be insecure at the time when they took the possession of the mortgaged property, for otherwise they would wholly fail in their defense to the action; and hence the first of the above-quoted instructions asked for by the defendant below, Jones, was very important, and should have been given. The next instruction above quoted asked for by the defendant and the one above quoted given by the court may be considered together. The plaintiff below, Annis, could not recover in replevin the two cattle disposed of and slaughtered before the action was commenced, or their value; but still their value, or the price for which they were sold, should have been taken into consideration by the jury in finding the value of the interest of the defendant and the bank in the replevied property, and this value or price of the cattle disposed of and slaughtered should be deducted from the mortgage debt, and Jones, as the representative of the bank, should recover as the value of their interest in the replevied property only the amount of the mortgage debt with this value or price deducted therefrom. The court below therefore erred in this particular also, for it permitted the plaintiff, Annis, to recover absolutely for these two cattle disposed of and slaughtered before the commencement of this action, and ignored wholly the mortgage and the mortgage debt. We think the court below also erred in re-

using to submit to the jury the special interrogatories above noted. It is perhaps not necessary, however, to comment specially with reference to them.

The judgment of the court below will be reversed, and the cause remanded for a new trial.

All the Justices concurring.

---

THE SMITH-FRAZER BOOT AND SHOE CO. v. W. A. WARE,  
*as Sheriff of Osborne County.*

**TROVER AND CONVERSION**—*Chattel Mortgage—Recovery—Evidence.* In an action against a sheriff by a chattel mortgagee, the lien of whose mortgage is subordinate to a first mortgage and the levy of three several orders of attachment, to recover the amount of his mortgage because of the conversion of the property, it is necessary that a wrongful taking, or a taking made wrongful by subsequent conduct, or a conversion, be established by the evidence.

**LIENS—Priority.** Three several orders of attachment levied on a stock of merchandise on the 30th day of October create a lien prior to and superior to that of a chattel mortgage filed in the office of the register of deeds on the 1st day of November of the same year.

**SHERIFF—Conversion—Responsibility.** A sheriff being in the actual possession of a stock of goods by virtue of a levy made in pursuance to three several writs of attachment in his hands, is not responsible to a subsequent chattel mortgagee for conversion, when a receiver duly appointed by the court from which the orders of attachment issued takes exclusive control and possession of the same, and sells and receives the proceeds.

*Error from Osborne District Court.*

THE case is fully stated in the opinion.

*James & Johnson, and Walrond, Mitchell & Heren, for plaintiff in error.*

*Robinson & Lawrence, for defendant in error.*



Opinion by SIMPSON, C.: This is an action commenced in the Osborne district court by the plaintiff in error against W. A. Ware, who was sheriff, to recover damages for the wrongful taking possession of and the conversion of certain property. At the October term, 1888, there was a trial by the court, and special findings were made that substantially embody all the material facts. The findings of fact and conclusions of law are as follows:

"FINDINGS OF FACT.

"On the day prior to the 30th day of October, 1886, one H. H. Withers was the owner and in the possession of a certain stock of goods and general merchandise in the town of Portis, Osborne county, Kansas, and had been doing a general retail business in the building in which the goods and merchandise were situated at the time. Said Withers was indebted to plaintiff in this case, and a large number of other creditors, and shortly before the 30th day of October, 1886, he executed and delivered to the Wm. B. Grimes Dry Goods Company a chattel mortgage for \$1,249.17 on said stock of goods, and said chattel mortgage was filed for record, in the office of the register of deeds of Osborne county, Kansas, on the 28th day of October of said year, and on the 30th day of October said Withers executed and delivered to plaintiff in this action a chattel mortgage for \$686.30, which is set up and made a part of the petition in this action, on the same stock of goods and merchandise, and said chattel mortgage was filed for record in the office of the register of deeds of Osborne county, Kansas, at 3:30 o'clock P. M. of the 1st day of November, 1886. The chattel mortgage from Withers to plaintiff was made, executed and delivered about 11 o'clock A. M., at Atchison, Kas., October 30, 1886. On the said 30th day, and about 5 o'clock in the evening of the said day, the defendant, sheriff of Osborne county, Kansas, levied three writs of attachment upon said stock of goods and merchandise. The aggregate amount of the said three writs was something over \$750; and the order directed the sheriff also to levy upon sufficient amount to cover costs in the probable sum of \$50. The sheriff levied each of three writs of attachment upon the entire stock of goods, and invoiced the same, and the invoice value was about \$4,600. Thereafter, and at divers times between and including the 3d day of November, 1886, and the

## Opinion of the Court.

8th, the sheriff levied these other writs of attachment on said stock of goods and merchandise for other creditors of Withers, subject to the levy of the first writ. The aggregate amount of the last six subsequent writs was about \$1,389.53, and the probable costs in each case. Some time after the levy of all of said writs the creditors under the three first orders of attachment, and the Wm. B. Grimes Dry Goods Company, by agreement, placed one Buchanan in possession of the stock of goods, not by order of court, but as a sort of an agreed receiver, with the understanding that he should sell the goods at retail, to the best advantage possible, and pay the proceeds into court, to abide the order of the court; and under the arrangement said Buchanan sold about \$700 worth of goods, but never paid anything into court. Said Buchanan was an employé of said Wm. B. Grimes Dry Goods Company. Afterward, and on the 15th day of January, 1887, the judge of this court, at chambers, appointed J. W. Marshall receiver, to take possession of said stock of goods, to sell the same, and to pay the proceeds into court. Said receiver took possession and made an invoice of the stock, which then invoiced \$4,022.50, when by leave of the court the Wm. B. Grimes Dry Goods Company commenced an action in replevin in this court against said receiver to recover possession of said goods by virtue of their chattel mortgage, and on the hearing of said case the mortgage of said Wm. B. Grimes Dry Goods Company was adjudged valid, and the court found the right of possession in favor of plaintiff in that action, and that the value of its interest therein was \$1,365.25. Under the writ of replevin in said action of Wm. B. Grimes Dry Goods Company against the receiver, the possession of the goods and merchandise was by the sheriff delivered to the plaintiff therein, and after the judgment in the case the plaintiff proceeded in that action to sell, and sold until he acknowledged the satisfaction of his mortgage claim, and tendered the remainder of the stock back to the receiver, Marshall, and the receiver accepted of the goods and proceeded to invoice the same, which then invoiced \$2,559.25, and sold the same for \$1,605, and making his report of the same to the court, which was approved and his bill of expense for \$67.75 and \$125 for his services was allowed, and the balance being paid into court, \$1,412.25. On the order of the court, said amount was paid as follows: First, all the costs in the attachment, which aggregated \$117.75, \$54.95 of which was in the three attach-

ment cases first levied, and \$62.80 the amount of costs in the six subsequent attachment cases; second, to the payment of the judgment rendered in the first three attachment cases; third, to the payment in full of the fourth attachment case, which left the remainder \$500, which was applied on the attachment cases. That is to say, there was \$718.80 paid out on the order of the court on the attachment suits, besides paying the judgment and costs in full in the first three attachment cases.

"At the time the attachments were levied, on the 30th of October, 1886, the sheriff found in possession of the store and stock of merchandise a man by the name of Knoff, who had possession of the key to the store, Withers being then in Atchison; Knoff had been in and about the store for some days prior to the execution of the mortgage from Withers to the W. B. Grimes Dry Goods Company, and shortly before Withers' departure to Atchison, Withers had employed Knoff to take charge of the store, telling him that he should hold it as the agent of the W. B. Grimes Dry Goods Company, but no agent or person representing the W. B. Grimes Dry Goods Company, unless it be Withers, ever authorized or employed Knoff to hold possession of the store. Two other clerks in the store at the time were clerks who had been regularly and previously employed for some months by Withers. Knoff was employed to take charge of the store only during the temporary absence of Withers, and on Withers' return he paid over to Withers the proceeds of the sales made in the store during his absence. On the 30th day of October, 1886, there was no apparent change in the manner of conducting the business, or the persons in charge, different from what there had been while Withers was conducting the business, except that Knoff had not previously had the keys, but on this day he had not or did not make known the fact, until he was interrogated in reference to it, and, when asked who was the clerk in charge of the business, referred the deputy sheriff to another clerk in the store, who had been there some months under the employment of Withers. There were two keys to the store; the evidence shows that Knoff had one key; whether he had both keys, or where the other key was, the evidence does not disclose. In the mortgage dated October 28, 1886, from Withers to W. B. Grimes Dry Goods Company, the provision in reference to possession is as follows: 'And until default be made as aforesaid, or until such time as the party of the second part shall deem him-

## Opinion of the Court.

self insecure, as aforesaid; the said party of the first part to continue in peaceful possession of all of said goods and chattels, as above specified.'

"Prior to that there was this reference to the possession in said mortgage:

"It is expressly understood and agreed by and between the parties hereto, that H. H. Withers shall have possession of said property only as the agent of the said W. B. Grimes Dry Goods Company, and that he sell said goods for cash only, in the usual course of business, keeping a true account of all the sales and expenses, and shall apply the proceeds of said sales to the payment of the debt hereby secured, and shall at all times, when demanded by the second party, make full and true account of all sales and receipts arising therefrom.'

"And the mortgage from Withers to the Smith-Frazer Boot and Shoe Company, plaintiffs, dated October 30, 1886, has the following provision in reference to the possession of the goods thereunder:

"It is expressly understood and agreed by and between the parties hereto, that H. H. Withers shall have possession of said property only as the agent of the said Smith-Frazer Boot and Shoe Company, and that he shall sell said merchandise for cash only, in the regular course of business, keeping a true account of all sales and expenses, and shall apply the proceeds to the payment of the debt hereby secured. He shall at all times, when demanded by the second party, make full and true account of all the sales and receipts arising therefrom.'

"And further on there is the following provision:

"The said possession of the said property heretofore mentioned to be held subject to the possession of the William B. Grimes Dry Goods Company, under the chattel mortgage executed to it October 28, 1886, to which mortgage this is made subject.'

"And further on there is the following provision:

"And until default be made as aforesaid, or until such time as the party of the second part shall deem himself insecure as aforesaid, said party of the first part to continue in the peaceful possession of all of said goods and chattels as above specified, all of which in consideration hereof he engages shall be kept in as good condition as the same now are.'

"On the 30th day of October, 1886, when the sheriff levied the three orders of attachment, he had no notice or knowledge whatever of the existence of the mortgage from Withers to the Smith-Frazer Boot and Shoe Company, executed on the forenoon of that day at Atchison. After the sheriff delivered the stock of goods and merchandise in question to Marshall, as receiver, under the order of the court, he never thereafter had any possession whatever of said goods, except that he took the same on the order of replevin in the suit of William B. Grimes Dry Goods Company against the receiver, and turned them over to the W. B. Grimes Dry Goods Company, and

never at any time sold or received any of the proceeds of said goods or any portion thereof in any way whatever. After the mortgage from Withers to plaintiff was executed, in Atchison, on the 30th day of October, 1886, the same was delivered to the mortgagor, Withers, to be filed for record. The ensuing day was Sunday, October 31st. The distance from Atchison to *Portis*, where Withers lived and did business, is 218 miles. Withers arrived by train from Atchison on Sunday evening at *Portis*, and on the following day drove to *Osborne*, the county-seat of *Osborne* county, which is a distance of  $8\frac{1}{2}$  miles, and filed the mortgage for record at 3:30 in the afternoon; said Withers returned from Atchison to *Portis* on the first train he could obtain after the execution of the mortgage. Said Withers consented to *Buchanan* acting as receiver in the selling of the goods, before the appointment of *Mr. Marshall* as receiver by the court; and after the commencement of the replevin action by the *W. B. Grimes Dry Goods Company* against the receiver, the sheriff turned over the possession of the goods to *Buchanan* as agent of the *W. B. Grimes Dry Goods Company*, and *Buchanan* was the agent who redelivered the same to the receiver after the sale of sufficient goods to pay the claim of the *W. B. Grimes Dry Goods Company*. The plaintiff's claim has not been paid, or any part thereof. At the time said Withers gave the mortgage in question to plaintiff, and on the 30th day of October, 1886, the plaintiff agreed to accept said mortgage, with the express understanding, at its request, that the agent of the *W. B. Grimes Dry Goods Company* had possession of the stock of goods and merchandise in question, and that he would hold the same as the agent of plaintiff and said *W. B. Grimes Dry Goods Company*. The amount of the plaintiff's claim on the 3d day of October, 1887, was \$686.30. During the time *Buchanan*, agent for *W. B. Grimes Dry Goods Company*, was selling the goods to satisfy the mortgage of *W. B. Grimes Dry Goods Company*, said Withers was present as clerk and assisted in making sales. The plaintiff made demand on the sheriff for sufficient of the proceeds of the sale to pay his claim a short time prior to the bringing of this suit. Demand was refused."

"CONCLUSIONS OF LAW.

"It seems at least a matter of question whether or not there is any complaint in the plaintiff's pleadings in this case against the defendant for any trespass committed in the levying of the

---

Opinion of the Court.

---

six writs of attachment on the stock of goods in question, between the 3d and 8th day of November, 1886. If there is any issue under the pleadings of a trespass in the levying of said writs, it is constructive, under the legal claim that, if any wrongful act is shown to have been committed by the defendant with reference to the goods at any time subsequent to the first levies, that it should relate back to the original levy. Under the findings of fact, I find that the levy of the first three orders of attachment by the defendant upon the stock of goods in question, on the 30th day of October, 1886, was rightful as against plaintiff's claim under its mortgage.

"I find also, as a conclusion from the facts previously found by the court, that under the terms of the mortgage which the plaintiff took from H. H. Withers upon the stock of goods in question, the agent of the W. B. Grimes Dry Goods Company, which had a prior mortgage to the plaintiff upon the stock of goods in question, should be held to be also the agent of the plaintiff in all matters pertaining to the possession, sale and control of said stock of goods and merchandise.

"I find also, as conclusions from said findings, that the agent of the W. B. Grimes Dry Goods Company, one Buchanan, with the assistance of H. H. Withers, who was by the terms of the plaintiff's mortgage made plaintiff's agent in the matter of the possession and sale of said stock of goods, sold \$700 worth of said goods before said W. B. Grimes Dry Goods Company replevied said goods from the receiver appointed by the court to sell the same, and that said amount was not accounted for, nor taken into consideration in the replevin action in determining the value of the plaintiff's interest in that case in said stock of goods under said mortgage. W. B. Grimes Dry Goods Company, by its agent, said Buchanan, and Withers, afterward sold or disposed of nearly \$1,500 of said stock of goods to satisfy the mortgage of the said W. B. Grimes Dry Goods Company. The court has found that the plaintiff's claim under its mortgage has not, in fact, been paid; but it seems probable, as a conclusion from such findings, that there is or was sufficient funds in the hands of the joint agent or agents of the said Wm. B. Grimes Dry Goods Company and the plaintiff to discharge both the plaintiff's and the claim of Wm. B. Grimes Dry Goods Company.

"The court finds as a proposition of law that when the Wm. B. Grimes Dry Goods Company, in the action of replevin for that purpose, recovered the possession of the stock

of goods in question from Mr. Marshall, the receiver appointed by the court, and the goods were turned over to the Wm. B. Grimes Dry Goods Company, in accordance with the judgment, that the lien of the attachments previously levied thereon by the sheriff, upon such delivery ceased to exist, and that thereafter the agent of the said Wm. B. Grimes Dry Goods Company, said Buchanan, and from the circumstances of the case probably, with the knowledge and consent of Withers, voluntarily turned said goods over to the receiver, Marshall, without any action whatever upon the part of the defendant, or any participation in the said act. If there is any issue in this case charging the defendant with trespass in levying the six subsequent attachments, on and after November 3, 1886, I find as a proposition of law that the sheriff should have levied such attachments subject to the mortgage of the plaintiff; but if the levy of such attachments without being levied subject to the claim and mortgage of the plaintiff was wrongful, I think no damage has been shown to the plaintiff by reason thereof, in this case, and that under the evidence its damage should only be considered as nominal at most. I find in favor of the defendant in this case, and against the plaintiff for costs.

"I think that the plaintiff is estopped, by the action of its agent in turning the goods over to the receiver, from claiming any damage in this case against the defendant. I think that the plaintiff, by its agent, was apprised at every step of the proceeding of the conversion of the goods into money and the manner in which the proceeds were being applied, and that it has been guilty of *laches*, standing by and seeing the goods it had the right to appropriated to the payment of other claims, without making any effort to assert its own claim upon the same, and that it should not be allowed to recover from the officer who levied the attachments, under all the circumstances of the case."

The boot and shoe company brings the case here for review, having saved all exceptions, and assigns many errors.

I. The first contention that demands consideration is respecting the issues made by the pleadings. The plaintiff in error in its petition charges that on the 30th day of October, 1886, the defendant wrongfully and unlawfully took possession of, and without the right, and against the consent of the plaintiff in error, entirely deprived them of the title to and

use of the property, and converted the same to his own use. The defendant below and defendant in error pleaded in justification under three several writs of attachment issued out of the district court of Osborne county, and delivered to him as sheriff of said county, and that he executed the same on said day without notice or knowledge of the chattel mortgage of the plaintiff in error; that afterward a receiver was appointed by said court, and he was ordered to and did turn over to the receiver the stock of merchandise levied upon by said orders of attachment. The plaintiff in error in its reply alleges that the Grimes Dry Goods Company recovered possession of the goods by an action of replevin against the receiver, but alleges that a portion of said goods, amounting to \$700 in value, had been wrongfully disposed of under and by virtue of the pretended writs of attachment set up in the defendant's answer before the action of replevin was commenced by the dry goods company. And it is further alleged in the reply "that this plaintiff has been wholly and wrongfully deprived of said goods and their ownership therein by reason of the wrongful and unlawful seizure and conversion of the said goods by the said defendant, under the pretended attachments as set up in his answer; that the said attachments and the writs were not valid." In this condition of the pleadings, the issue was narrowed to the trespass, if any, committed by the defendant under the three writs of attachment issued and levied on the 30th day of October, because this is not only the natural construction of the pleadings, but after judgment they must be construed so as to sustain the judgment. Before judgment, if they were attacked, that construction would be adopted that told most strongly against the pleader; so under the operation of any of these rules the result would be the same. The inquiry is then restricted to any conversion by reason of the three orders of attachment issued on October 30th.

II. The next contention of the plaintiff in error is that it was in possession of the stock of goods, subject to the rights and possession of the dry goods company. This contention is principally based upon a construction of ¶ 3903 of the act



relating to the mortgage of personal property. This section provides "that the mortgage shall be void unless forthwith filed," etc. The plaintiff in error claims that when its chattel mortgage was executed in Atchison, on Saturday, October 30th, and filed for record on the 1st day of November, at 3:30 o'clock P. M., the intervening day being Sunday, and Atchison being 218 miles away, it was forthwith filed, and, when filed, all of its provisions took effect when executed, on the 30th day of October, so as to have precedence of the attachment levies made intermediate its execution and filing for record. We do not think this is the proper construction to be given that section. It is not the one generally acted upon by the bar, or contemplated, if not expressly decided by this court. Our view is, that the mortgage only became operative, as notice to other creditors, after it had been filed in the office of the register of deeds. It would involve innocent parties in interminable difficulties to hold that, although a chattel mortgage had been filed in the office of the register of deeds days or weeks after its execution, yet it was notice from the date of its execution. We must hold, therefore, that whatever rights the plaintiff in error derived from its chattel mortgage, other parties who had no knowledge of its execution were only bound by the notice imparted by its filing in the office of the register of deeds. Therefore, at the time of the levy of the three orders of attachment, on the 30th day of October, complained of in the reply of the plaintiff in error to the answer of Ware, the plaintiff in error had no rights in or to these goods by virtue of the chattel mortgage executed by Withers that Ware or the attaching creditors had notice of. The levies were good as against the plaintiff in error, whether good against the dry goods company or not. The plaintiff in error, at the time of these attachment levies, was not in possession of the goods attached, had no legal right to their possession at that time as against the attaching creditors, and consequently this defendant in error, as sheriff, and as the officer who made the seizure and levy by virtue of the orders of attachment, could not and did not commit an act of trespass against the plaintiff in error.

---

Opinion of the Court.

---

The fact that the dry goods company successfully prosecuted an action of replevin for the possession of these goods does not help this plaintiff in error. The dry goods company was entitled to the possession of the goods because it had the first mortgage on them; and because, at the time the three attachments were levied, it was in the actual possession, or, the conditions of the mortgage being broken, it was entitled to the possession. It could succeed in such an action for either of these reasons, but the possession of the dry goods company was not the possession of the plaintiff in error, because its succession to the possession of the goods was defeated by its failure to file its mortgage in the office of the register of deeds until after the levy of the attachments.

III. The plaintiff in error, in its reply to the answer of the defendant below, alleges that a portion of the said goods embraced in its chattel mortgage, amounting to the sum of \$700, had been wrongfully disposed of under and by virtue of the pretended writ of attachment set up in the defendant's answer, by the defendant herein, before said action of the said Wm. B. Grimes Dry Goods Company was brought to recover said goods, or the value of its special ownership therein. The facts are, as found by the court, that some time after the levy of all of the orders of attachment the creditors under the three first orders of attachment and the Wm. B. Grimes Dry Goods Company and Withers, the debtor, by agreement placed one Buchanan in possession of the stock of goods as an agreed receiver, with the understanding that he should sell the goods at retail, to the best advantage possible, and pay the proceeds into court; and under the arrangement said Buchanan sold about \$700 worth of goods, but never paid anything into court; that said Buchanan was an employé of the Wm. B. Grimes Dry Goods Company. The plaintiff in error claims that this was a conversion by the sheriff. We think the attaching creditors and the first mortgagee had the legal right to stipulate as to the possession of the goods, and that from the moment the defendant in error yielded possession in pursuance of such agreement he was no longer either per-

sonally or officially liable for the same; certainly not to any of the parties to the agreement; and certainly under these circumstances not to the plaintiff in error, who was not in court, or was making no claim for them or any part of them, or who was not asserting any rights in the controversy; and especially is this true when the owner of the goods in equity, Withers, was a party to this agreement; but even if the sheriff had been disposed to have refused to deliver the goods to the agent of the attaching creditors and the dry goods company, such delivery could have been enforced by an order of the court, because the dry goods company was entitled, by the plain words of the statute, to the possession of the goods; and that right it subsequently enforced against a receiver appointed by the court. So, if the right of recovery by the plaintiff in error is based upon the default of the agent to pay into court the \$700 worth of goods sold by him, it is not good against this defendant in error. The plaintiff in error has a plain remedy for the failure of the agent of the contracting parties to account for the proceeds of sale. As we understand the law, attaching creditors, or plaintiffs who resort to attachment proceedings and thereby secure first liens, have the absolute legal right to control such proceedings. They can release their levies entirely, or they can by agreement with each other and with the debtor take the property out of the hands of the sheriff, or the officers who made the levies, and commit it to the care and possession of some one else, and thereby absolve the sheriff from liability for the original levy or continued possession. It is true that by this agreement they may create a liability against themselves on behalf of some other creditor, but any other rule would make a sheriff liable for loss of the property after the possession was taken from him by parties in interest. All this, without reference to the finding of the court that the agent selected by the dry goods company and the attaching creditors was also the agent of the plaintiff in error. It may be well doubted under the facts in this record and the case of *Swiggett v. Dodson*, 38 Kas. 702, if the Wm. B. Grimes Dry Goods Company ever had the actual possession of the goods

---

Opinion of the Court.

---

of Withers, and if there was that continued change of possession required by the statute, as held in that case; and hence, if the three attachment levies of October 30th had not intervened, the same doubt would exist as to the possession of this plaintiff in error, subject to that of the dry goods company. The finding of the court that Buchanan was the agent of the plaintiff in error is largely a deduction from the terms of the mortgage and the circumstances attending its execution, rather than a conclusion of fact based upon express oral evidence; and yet Blake, a witness for the plaintiff in error, and the attorney of the dry goods company, swears that he was in possession of the stock of goods at the time of the execution of the chattel mortgage by Withers to the plaintiff in error. He fully understood that his possession was as agent for the dry goods company and the boot and shoe company jointly, and that point was fully agreed upon by both parties.

Frazer, the treasurer and credit man of the boot and shoe company, states in his deposition that he agreed to accept the mortgage on the condition that the dry goods company would hold possession for both; so that there is some evidence to support the finding of the court that Buchanan was the agent of the plaintiff in error, as well as of the dry goods company and of the first three attaching creditors; and, upon this theory of the case, it would be gross injustice to say that the plaintiff in error can now hold Ware responsible for any shortage occasioned by the act of Buchanan.

IV. The plaintiff in error in this case must recover, if at all, under the allegations of its petition against the defendant in error, for a wrongful taking, or a taking made wrongful by subsequent conduct—a trespass rather than a trover—because it is very clear from the record that, even if the agreed receivership of Buchanan had no validity, the court appointed Marshall receiver without objection by any of the interested parties, and ordered the receiver to take possession of the goods, and hence there has been no conversion by the sheriff. He did not sell or otherwise dispose of them, but delivered the possession of them to the receiver on an order of the court.

We have seen that the original seizure of the goods was not wrongful as against this plaintiff in error, because of the priority of lien of the attachment levies. If the plaintiff in error seeks to recover in trover, then it must show either absolute ownership, or a special interest in the property, coupled with actual possession, or the right to the immediate possession at the time of the tortious act. The plaintiff in error had a special interest in the property after its chattel mortgage was filed in the register's office, but did not have either actual possession, or the right of immediate possession, because both the dry goods company's mortgage and the three attachment levies of October 30th were prior levies, and there can be no successful contention but that the right to possession by the boot and shoe company was subordinate to the others.

V. Our conclusions are, that because the plaintiff in error fails to show a wrongful taking by Ware, as sheriff, in the first instance, and because it is shown that Ware, as sheriff, did not sell or dispose of the property, but that it was taken possession of by a receiver duly appointed by the court, the plaintiff in error has no right to recover in this action. The other assignments of error are not regarded as material, in this view.

We recommend an affirmance of the judgment.

By the Court: It is so ordered.

All the Justices concurring.

THE STATE OF KANSAS, *on the relation of John N. Ives, Attorney General*, v. THE KANSAS CENTRAL RAILROAD COMPANY *et al.*

47 497  
55 710

RAILROAD COMPANY—*Repairs—Recommendation of Railroad Commissioners.* Under the provisions of § 5, chapter 124, Laws of 1883, ("1828, Gen. Stat. of 1889,) an order or recommendation of the board of railroad commissioners of the state to a railroad company, requiring repairs to be made upon its road or track, to promote the security, convenience and accommodation of the public, is advisory only. Such an order or recommendation is not final or conclusive upon the railroad company or in the courts.

*Original Proceeding in Mandamus.*

ON the 20th of October, 1891, the State of Kansas, upon the relation of the attorney general, filed its written application in this court, supported by certain affidavits, praying for a peremptory writ of *mandamus* to compel the Kansas Central Railroad Company and the Union Pacific Railway Company to repair, at once, the Kansas Central railroad from Leavenworth to Miltonvale, by relaying the same with 56-pound steel rails, in accordance with an order of the board of railroad commissioners of the state of Kansas. On November 4, 1891, an alternative writ of *mandamus* was allowed and served upon the defendant companies, which recited, among other things:

"That the board of railroad commissioners of the state of Kansas having been advised of the condition of the Kansas Central railroad, and having made a careful examination and inspection of the same, on the 13th of May, 1891, found and determined that said railroad had been and was in an unsafe and dangerous condition for the transportation of persons and property over the same, by reason of the insufficiency, condition and weight of the iron rails in said tracks; that by reason of its condition, the train service in use on like railroads has been abandoned; and that, pursuant to said finding and determination, the said board made its order that the line of said railroad should be repaired from the city of Leavenworth to the town of Miltonvale, by the laying of new rails

---

The State, *ex rel.*, v. K. C. Rld. Co.

---

of standard pattern, and of not less than a weight of 56 pounds to the lineal yard; that this order was mailed to the vice-president and general manager of the defendant, the Union Pacific Railway Company; that afterward, on June 9, 1891, said board again wrote said officers concerning said order; that afterward, on June 16, 1891, said officer was again informed of said order by telegram; that on the last day aforesaid, the said officer replied, in substance, that the whole matter had been submitted to those who owned the road, from whom said officer received his instruction; that on June 19, 1891, the said board informed said officer that immediate action on his part was expected; that on the 21st day of June, 1891, said officer replied to the said board that he had sent the correspondence to the New York office, where estimates were then being considered, together with his own recommendation in harmony with the demands of the said board; that on the 16th day of September, 1891, the vice-president and general manager of said defendant applied to said board for a modification of said order; that on the 18th day of September, 1891, the said officer of said defendant again asked for a modification of said order, and the said board again, on September 30, informed said officer that it would not recede from said order; that said railroad has not been maintained to meet the demands of public obligations; that it has been neglected; that the board further informed him that it would relieve itself of the responsibility to secure action which was then formally refused by said officer; and said officer was advised that the whole matter had been placed in the hands of the governor of the state of Kansas for his action, and that the governor of the state of Kansas, by his written direction to the attorney general, directed the institution of this suit."

On November 5, 1891, the Union Pacific Railway Company filed its motion to quash and set aside the alternative writ, for the reason that it did not state facts sufficient to entitle the plaintiff to the relief sought. This motion was heard on Friday, November 6, at the November session of the court for 1891.

The powers and duties of the board of railroad commissioners of the state, as prescribed by the statute, so far as necessary to be referred to in the determination of this case, are as follows:

¶ 1328. "Said commissioners shall have the general su-

## Statement of the Case.

pervision of all railroads in the state operated by steam, and all express companies, sleeping-car companies, and all other persons, companies or corporations doing business as common carriers in this state; and shall inquire into any neglect or violation of the laws of this state by any person, company or corporation engaged in the business of transportation of persons or property therein, or by the officers, agents or employes thereof; and shall also from time to time carefully examine and inspect the condition of each railroad in the state, and of its equipment, and the manner of its conduct and management, with reference to the public safety and convenience. Whenever in the judgment of the railroad commissioners it shall appear that any railroad corporation or other transportation company fails, in any respect or particular, to comply with the terms of its charter or the laws of the state, or whenever in their judgment any repairs are necessary upon its road, or any addition to its rolling-stock, or any addition to or change of its stations or station-houses, or any change in its rates for transporting freight, or any change in the mode of operating its road and conducting its business, is reasonable and expedient in order to promote the security, convenience and accommodation of the public, said commissioners shall inform such corporation of the improvement and changes which they judge to be proper, by a notice thereof in writing, to be served by leaving a copy thereof, certified by the commissioners' secretary, with any station agent, clerk, treasurer, or any director of said corporation; and a report of the proceedings shall be included in the annual report of the commissioners to the governor. Nothing in this section shall be construed as relieving any railroad company, or other transportation corporation, from their responsibility or liability for damage to person or property." (Laws of 1883, ch. 124, § 5.)

¶ 1352. "That whenever in the judgment of the board of railroad commissioners it is necessary to the convenience or accommodation of the public that two or more railroads that cross or run parallel with each other should connect at or near the point of crossing or places of business along such railroad for the transfer of cars from one road to another, the board may require the construction of necessary switch connection between such railroads at the points where deemed necessary, in the following manner: Said board of railroad commissioners shall serve upon the railroad companies whose roads it is deemed necessary to connect a certified copy of their finding



---

The State, *ex rel.*, v. K. C. Rld. Co.

---

and decision, in which shall be stated the character of connections to be built, whose duty it shall then be to construct such switch connections within such time as the said board shall prescribe, and the expense of the same shall be borne equally by the companies whose roads so connect or run parallel. If one of the said companies shall build the whole of such switch, it may recover one-half of the cost of the same from the company whose duty it was to construct one-half of such switch." (Laws of 1886, ch. 133, § 1, as amended by Laws of 1889, ch. 193, § 1.)

¶ 1355. "It shall be the duty of the board of railroad commissioners, upon complaint and application by the mayor and council of any city or the trustee of any township in this state, requesting an order of said board to require any railroad company in this state to construct any depots, side-tracks, switches or other facilities at any point on the line of such railroad, for the convenience and safety of the public in the transaction of business with such railroad, and the interchange of business between connecting or parallel railroads at any station, town or city in this state, to investigate such complaint after giving proper notice to the railroad companies interested; and said commissioners after such examination shall make such orders as they deem necessary and proper in relation to the construction and maintenance of such depots, connections, switches, or side-tracks, as in the judgment of said board shall be necessary." (Laws of 1889, ch. 192, § 1.)

¶ 1356. "If complaint shall be made by any railroad company in this state against any other railroad company in this state on account of failure, neglect or refusal to comply with the provisions of section nine of an act entitled 'An act concerning railroads and other common carriers,' approved March 6, 1883, the board of railroad commissioners shall upon notice to said railroad company investigate such complaint, and thereupon make such order as in the opinion of said board shall be just and reasonable for the public interest, and may fix in such order a reasonable switching charge for any service required by such order, which switching charge shall be paid by the railroad company receiving the service, and shall not be added to the rate paid by any consignor or consignee interested in such shipment." (Laws of 1889, ch. 192, § 2.)

¶ 1357. "The board of railroad commissioners may enforce its orders for the erection and maintenance of depots, the construction of connections, side-tracks, and switches, and charges

---

Opinion of the Court.

---

for switching between connecting or parallel lines of railroad as hereinbefore provided for, as provided in the next section." (Laws of 1889, ch. 192, § 3.)

Section 4 of chapter 192, Laws of 1889, provides that for every neglect or refusal of any railroad company, corporation, receiver or person operating any railroad in this state to comply with any order of the board of railroad commissioners of this state, made in pursuance of the provisions of chapter 192, Laws of 1889, such corporation or person so neglecting or refusing shall forfeit to the state the sum of \$100 for each and every day that any such order is neglected or disobeyed after the expiration of 30 days from the day of service of such order. (Gen. Stat. of 1889, ¶ 1358.)

*John N. Ives*, attorney general, and *J. G. Waters*, for plaintiff.

*A. L. Williams*, and *N. H. Loomis*, for defendants.

The opinion of the court was delivered by

HORTON, C. J.: The question for our consideration in this case is not what power the legislature of the state may delegate or confer upon the board of railroad commissioners, but what power is conferred by the existing statutes. It is contended upon the part of the state that the finding of the railroad commissioners of the 13th day of May, 1891, that the Kansas Central railroad "is in an unsafe and dangerous condition for the transportation of persons and property, by reason of the insufficient condition and weight of the iron rails in the tracks thereof," is final and conclusive upon the defendants and this court. Further, that the order of the commissioners requiring the Kansas Central railroad to be relaid with new rails of standard pattern, and of not less weight than 56 pounds to the lineal yard, is also final and conclusive; that, in proceedings in this court to compel a compliance with the order of the commissioners, the statute neither contemplates nor allows any issue to be made or inquiry had of the condition of the railroad examined by the commissioners, or

---

The State, *ex rel.*, v. K. O. Rld. Co.

---

of the reasonableness of the order made by them. The defendants claim that the order of the commissioners, under the terms of the statute, is advisory only. If the finding of the commissioners and their order are final and conclusive, this court has no power to hear or determine any issue of fact, except upon the allegation that the defendants have refused to comply with the order for repairs. If the finding and order of the commissioners are final and conclusive, this court, upon a railroad company refusing a compliance therewith, must at once, upon proper application being made, register the order and enforce the same literally.

The power which is claimed by the commissioners to be conferred upon them, so far as this case is concerned, must be found, if found anywhere, in § 5, chapter 124, Laws of 1883. (Gen. Stat. of 1889, ¶ 1328.) The legislature has not conferred upon the commissioners by said statute the power claimed. There is nothing in the statute which states, or can be construed to state, that the orders of the commissioners concerning repairs upon a railroad shall be final or conclusive, or that the courts must carry out their determinations or judgments. Upon the other hand, the statute provides only that whenever in the judgment of the commissioners any repairs upon a railroad are demanded for the security, convenience and accommodation of the public, they shall inform the railroad corporation of the improvements and changes which they adjudge to be necessary, and then report their proceedings to the governor. Nowhere is it stated in the statute that the recommendations of the commissioners concerning repairs must be complied with *nolens volens* by the company; nor does the statute authorize the governor to carry into execution the order of the commissioners. As to the necessary repairs of a railroad, the finding and order of the commissioners, under the statute, are advisory only—nothing more. The order cannot be enforced by the commissioners; it cannot be enforced by the governor; and it cannot be enforced specifically by this or any other court. Under the statute, as existing, whenever an ac-

Railroad com-  
pany — repairs  
— recommen-  
dation of rail-  
road commis-  
sioners.

tion is brought in any court to compel a railroad corporation to repair its tracks or operate its road in a particular way, for the security, convenience and accommodation of the public, the corporation is entitled to an opportunity to traverse its alleged violation of duty, and to have a judicial investigation of the charges made against it, under the forms provided for in the trial of other civil actions. Not only is the finding and order of the commissioners not an absolute finality, but the statute concerning repairs does not make them even *prima facie* evidence. When the courts are to decide such a case as this, the whole truth of the matter alleged or denied is subject to a judicial investigation. Each party is entitled to its day in court before a conclusive finding is made or a final order entered. The commissioners are not clothed with judicial functions. They have neither the powers of masters, referees, juries, or judges. Their findings are not like the findings of a master, referee, jury, or court. When performing duties under said § 5 of chapter 124, Laws of 1883, they may examine and decide what repairs are proper, and give notice thereof to the railroad corporation, and report their proceedings to the governor. The statute confers no other duty or power.

The persons first appointed as commissioners were Hon. James Humphrey, Hon. L. L. Turner, and Hon. Henry Hopkins. In the first report of the commissioners, their powers under said § 5 were very clearly and fully defined by them. They said:

“The commissioners, under this section, have no power to enforce an order. They can simply advise the company in fault of the changes desired or deemed necessary. To have invested the commission with the power to enforce its own orders, it would have been necessary to have changed the character of the board and the scope of its functions and powers. It would have been necessary to have given to the commission all the powers of a court of chancery, to be exercised within the scope of its assigned duties, with such ministerial officers attached to the board as are usual and necessary to such tribunals, to execute its injunctions and mandates. It would have ren-

---

The State, *ex rel.*, v. K. C. Rld. Co.

---

dered it necessary to have instituted a formal investigation, upon proper complaint and notice to the company complained of, and the rendition of a formal judgment and decree upon the evidence which should be submitted to the board. Manifestly, in such case it would have been improper for the board to have acted upon knowledge and information gathered from personal observation, or the *ex parte* statements of individuals, as much so as it would be for regularly-organized courts to act judicially upon evidence which has never been disclosed to the opposite party to the suit. The supervisory powers of the commission would in such case extend only to such matters as should be formally brought before it by complaint, and no such complaint would be made until some one had become the suffering victim of some neglect, failure, or other violation of duty on the part of a railroad company. Thus the chief benefits which were intended to be secured by giving the commissioners general supervisory powers would be sacrificed by imposing upon them those limitations in the exercise of functions which are necessary to impress upon judicial decrees the weight and character of impartiality." (First Annual Report of Railroad Commissioners, 1883, p. 4.)

In 1888, the commissioners were Hon. Albert R. Greene, Hon. Almerin Gillett, and Hon. James Humphrey. They evidently did not understand that their orders were final or conclusive, and that the courts, under the existing statute, without a full investigation and hearing thereof, are required to enforce their orders. They said:

"The orders, decisions and recommendations of the board, upon the various matters which have come before it the past year, have in nearly all instances been complied with and carried out by the railroad companies affected by such decision or order. In one instance, however, the company affected by a decision of the board has demurred, and so far, we have been advised, has refused to comply with its requirements. . . . It is respectfully recommended that provision be made by statute for the enforcement, by appropriate remedy, in courts having jurisdiction, of the decisions and orders of the board." (Sixth Annual Report of Railroad Commissioners, 1888, pp. 45, 46.)

In compliance with the foregoing request, the legislature passed an act on the 2d of March, 1889, attempting to compel

---

Opinion of the Court.

---

the enforcement of the orders of the railroad commissioners for the erection and maintenance of depots, the construction of connections, side-tracks, switches, etc.; but the act of March 2, 1889, does not attempt to confer any additional power upon the commissioners or the courts in enforcing their orders concerning the repairs or the actual operation of railroads.

In 1890, the commissioners were Hon. James Humphrey, Hon. George T. Anthony, and Hon. Albert R. Greene. In their report they also asked for additional power. They said :

“It should be provided by law that the order of the railroad commissioners shall be the governing law of the railroad companies, to be obeyed and respected by them, until vacated by a competent judicial tribunal on appeal.” (Eighth Annual Report of the Railroad Commissioners, 1890, p. 10.)

No additional power was conferred at the session of the legislature for 1891. Therefore, as before stated, the only act that it is necessary to construe in this case is § 5, chapter 124, Laws of 1883. (Gen. Stat. of 1889, ¶ 1328.) When the legislature of 1889 gave additional powers to the commissioners concerning railroad stations, connections, side-tracks, switches, etc., but refused to change the statute for the enforcement of the recommendations of the commissioners concerning the necessary repairs, etc., of railroad tracks, it is clearly evident that the members thereof did not think the order of the commissioners in such matter should be an absolute finality, or should be enforced without the ordinary judicial investigations in the courts. The counsel representing the state in this case, upon the hearing thereof, made a very able argument to establish that, within the police power, the state has ample authority to compel the repairs of any railroad, so that it may be operated safely for the public. This argument, although strong and ingenious, cannot be applied here, because the legislature has not, by statute, conferred, or attempted to confer, the power claimed, even if it had the authority so to do. It will be noticed, however, by the language of said § 5, that the power of the commissioners is as effective in matters relating to the convenience and accommodation of the public as to those hav-

ing reference to security or safety. In Minnesota, in 1887, the legislature granted by statute to the railroad commissioners of that state the power to fix the rates of charges for the transportation of property by railroad companies, and provided their orders should be final and conclusive. The statute was held by the supreme court of the United States in conflict with the constitution of the United States, and therefore void. (*Railroad Co. v. Minnesota*, 134 U. S. 418.)

It is an historical fact, well known by those who attended the session of the legislature of 1883, and by those acquainted with the proceedings of that body, that there was a bitter contention among its members as to what power should be conferred upon or delegated to the commissioners to be appointed under the act or bill then pending for adoption. A part of the members, under the lead of Hon. Eugene F. Ware and others, were favorable to the delegation to the commissioners and the courts full authority for the enforcement of their orders; others, and a majority, opposed the delegation of such power; and the result was that advisory action only on the part of the commissioners was provided for. The national interstate commerce act of February 4, 1887, differs widely from the act of 1883 of our legislature, in expressly providing for writs of *mandamus* to be issued out of the United States circuit courts to compel railroad companies to comply with the orders of the national commission, and also for punishing in such courts railroad companies for violating or neglecting to obey any lawful order or requirement of the national commission. (Vol. 1, Interstate Commerce Commission Reports, 665-671.) We understand that generally the recommendations of the state commissioners have been complied with by all of the railroad companies affected thereby, and if the road and track of the Kansas Central are in the dangerous condition reported by the commissioners, it is most unfortunate to the public that the corporation having the operation of the road has not long since carried out the requests of the commissioners, so as to put the road and track in a safe and secure condition for the transportation of freight and the carrying of passengers; but

---

The State v. Riggs.

---

when we are called upon to perform a judicial duty, we cannot go beyond the limits of our power as defined by the constitution and statutes of the state, however strong the necessity may be apparent for the immediate exercise of arbitrary control.

Without deciding other questions raised upon the argument, the motion to quash must be sustained, because the legislature has not provided, or attempted to provide, that the recommendations of the railroad commissioners concerning the repairs of railroads, their tracks, etc., are an absolute finality. The plaintiff will have leave to amend the alternative writ, if it so desires, by setting forth all allegations necessary of the dangerous condition of the track or road-bed of the Kansas Central Railroad Company; its refusal to operate its road safely or securely, and its neglect of duty, if any, in any other matters, and also to ask for such orders in the premises as may be deemed proper. Issues may be joined thereon, as in other *mandamus* cases, and an investigation will be judicially had of the truth of the matters in controversy. What power this court may lawfully exercise in compelling necessary repairs upon a railroad, or in requiring the safe operation of such a road, we leave for future consideration.

All the Justices concurring.

---

THE STATE OF KANSAS V. DOUGLASS RIGGS.

**HOMICIDE — Preliminary Examination — Plea in Abatement not Sufficient.**

Where the defendant in a criminal prosecution in the district court, who is charged upon information with committing murder, files a plea in abatement, setting forth that he has not had a preliminary examination or waived the same, except upon a warrant of arrest which he claims does not charge murder, and in his plea he does not state that he has not had any preliminary examination at all, or that the evidence upon the preliminary examination did not prove mur-



---

The State v. Riggs.

---

der, and does not state that at the time when the information was filed in the district court he was not a fugitive from justice, held, that such plea in abatement is not sufficient.

*Appeal from Sumner District Court.*

FROM a conviction and sentence for murder in the second degree, at the April term, 1889, the defendant, *Riggs*, appeals. The material facts are stated in the opinion.

*Stanley & Hume*, for appellant.

*John N. Ives*, attorney general, for The State.

The opinion of the court was delivered by

VALENTINE, J. : The defendant, Douglass Riggs, was prosecuted upon a criminal information charging him with the commission of the offense of murder in the first degree, and he was convicted of and sentenced for murder in the second degree, and he now appeals to this court. It appears that prior to the trial in the court below he filed a plea in abatement, the second ground of which, and the only one relied on, reads as follows :

"Second. That the defendant is informed by counsel, and believes, that the information filed against him in this action charges the defendant with the offense of murder in the first degree and the offense of murder in the second degree and manslaughter in the first degree; that the defendant has never had a preliminary examination of or for either of said offenses, and has never waived his right to a preliminary examination for either of said offenses; that the only offense of and for the commission of which the defendant has been arrested and had or waived a preliminary examination is the offense set forth and described in a certain warrant issued by William Nyce, a justice, of the examination on which said information by said county attorney has been filed; that the defendant hereby refers to said warrant, commitment, and transcript, and makes each of the same a part of this plea; that the defendant has not had any preliminary examination or waived his right to such examination for the commission of any offense other than the particular offense set forth in the said warrant above described.

---

Opinion of the Court.

---

"Wherefore, the defendant demands that the information by the county attorney filed in this action be wholly abated, and stricken from the files of this action."

The "warrant," or rather the warrant of arrest, referred to in the foregoing plea, which was the original warrant in the case, omitting all except that portion which states the offense, reads as follows:

"That on the 28th day of October, 1888, in Sumner county and state of Kansas, Douglass Riggs did then and there unlawfully and feloniously attack Robert E. Sharp with a knife, and did then and there cut and wound the said Robert E. Sharp, and the said Robert E. Sharp died from the said wounds received from the jackknife in the hands of said Douglass Riggs."

The "commitment," or rather the warrant of commitment, referred to in the foregoing plea, which of course was issued by the justice of the peace after the preliminary examination was had, or after the waiver of the same, as the case may be, omitting all the formal parts, reads as follows:

"Whereas, it appearing that the offense of murder has been committed, and there is probable cause to believe that the defendant, Douglass Riggs, is guilty of the commission of said offense; and whereas, no sufficient bail has been offered in said defendant's behalf for his appearance at the next term of the district court of said county to answer said charge alleged against him: you are therefore commanded to take and commit the said defendant to the jail of Sumner county, there to remain until he shall be discharged by law; and deliver this writ to the jailer thereof."

There is nothing in the record that shows that a full "transcript" of the proceedings had before the justice of the peace that issued the aforesaid warrants of arrest and of commitment, and before whom the preliminary examination may have been had or waived, is contained in the record, and certainly only a portion of such proceedings is contained in or shown by the record. The state filed a demurrer to the above plea in abatement, which demurrer was sustained by the court and the plea in abatement was overruled. Afterward a trial was had upon

---

The State v. Riggs.

---

the merits, before the court and a jury, with the result aforesaid. Perhaps it should also be stated that the defendant refused to plead to the information, and that the plea of not guilty was entered for him, and upon conviction he was sentenced to imprisonment in the penitentiary for the term of 10 years.

The only question presented to this court for decision is, whether the court below erred or not in sustaining the plaintiff's demurrer to the defendant's plea in abatement, and in overruling such plea; and the only ground for claiming error in this respect is the claim of the defendant that the original warrant of arrest did not charge the offense of murder in the second degree, of which the defendant was found guilty. It will be noticed that the plea in abatement does not specifically allege that no preliminary examination was had at all, but only that no preliminary examination for the offense of murder in either degree, or of manslaughter in the first degree, was had or waived, and this for the reason only that the warrant of arrest did not charge murder at all, and did not charge manslaughter in the first degree; and nothing is said in the plea in abatement as to whether the defendant was a fugitive from justice or not at the time when the information was filed. If he was a fugitive from justice at that time, it was not necessary that he should have had any preliminary examination at all, or any opportunity to waive the same; (Crim. Code, § 69; *The State v. White*, 44 Kas. 514, 522;) and if in fact he had a preliminary examination, even on the aforesaid warrant of arrest, and if it was shown by the evidence upon such preliminary examination, in the language of the warrant of commitment, "that the offense of murder has been committed, and there is probable cause to believe that the defendant, Douglass Riggs, is guilty of the commission of said offense," then an information charging murder in the degree of which the defendant was found guilty, which was the second and lowest degree of murder, was authorized. As the warrant of commitment was for murder, it evidently shows, *prima facie* at least, either that the evidence on the preliminary ex-

amination proved murder, or that the defendant waived a preliminary examination for murder. Besides, it is difficult to say that the original warrant of arrest did not by fair intendment or implication charge murder. Of course it did not charge the offense in such terms as would be necessary to make an information or an indictment sufficient, but did it not in ordinary language charge murder in at least the second degree, by fair and reasonable implication or intendment? It is not necessary to decide this question, and we shall not do so, for we think the plea in abatement itself was insufficient in not expressly alleging that the defendant did not have a preliminary examination at all, or that the evidence upon the same did not show murder, and that he was not a fugitive from justice. (See *The State v. White*, supra.)

The judgment of the court below will be affirmed.

All the Justices concurring.

---

J. M. STEELE *et al.* v. DEMARIS A. DUNCAN *et al.*

1. **JUDGMENT—Vacation for Fraud—Pleading.** Where a judgment obtained against several defendants is sought to be vacated on account of the fraud practiced by the successful party, and it is also alleged that it is void as to some of the defendants because no service of summons was made upon them, those not served are not confined to the remedy prescribed in the last clause of § 575 of the civil code, of having the judgment vacated on motion, but may join with the other defendants in an action to have it set aside for the fraud practiced by those who obtained the same.
2. **ALLEGATIONS—Sufficiency.** The allegations of fraud contained in the petition examined, and, although somewhat indefinite, are held to be sufficient to withstand a demurrer filed against the same.

*Error from Morris District Court.*

THIS action was brought by the defendants in error for the purpose of vacating a judgment alleged to have been obtained

---

Steele v. Duncan.

---

by fraud on April 22, 1886. In their petition, they allege substantially, that on August 5, 1884, Elizabeth Sample brought an action for the partition of certain premises in which J. M. Steele, M. K. Sample, Demaris A. Duncan, George W. Sample, James A. G. Sample, Louisa F. Eyler, John E. Sample, James Hayslip, Albert Hayslip, Lizzie Stewart, Ida Stewart, Sarah C. Sample, Timothy B. Sweet, trustee of J. W. Smith and Henry Gay, were made parties defendant. In that action J. M. Steele filed an answer and cross-petition, claiming a portion of the lands by reason of a purchase from M. K. Sample, and asked to have the title quieted against the other parties. M. K. Sample and Sarah C. Sample also filed separate answers, denying the right of the plaintiff to a portion of the lands, and asking that the petition might be dismissed as to them with their costs. Upon the issues thus made a journal entry, purporting to have been made by agreement of the parties to the suit, was entered upon the journal, in which it was stated that on April 22, 1886, at the April term of the district court of Morris county, the cause came on for hearing, and upon its being called the plaintiffs and each of the defendants except Timothy B. Sweet, J. W. Smith, and Henry Gay, appeared either in person or by attorneys; and thereupon, by consent and agreement of all parties in the cause, the several motions and demurrers filed by the several parties in said cause were withdrawn from the files by the parties filing the same by order of the court; and thereupon the defendant J. M. Steele filed in said cause, by the consent of the court and the parties thereto, his separate answer to the petition of the plaintiffs and cross-petition of John E. Sample *et al.* in said cause; and thereupon the cause came on to be heard upon the issues joined by the pleadings in the cause, and the parties by consent waived a jury and tried the cause to the court; and each of said parties having introduced all his or her evidence and rested, and after argument, the court, upon being duly advised, found generally all the issues in favor of Matthew K. Sample and Sarah C. Sample, his wife, and J. M. Steele. It is recited to have been found and adjudged that

## Statement of the Case.

J. M. Steele was then, and ever since the 6th day of September, 1884, had been, the owner of all the real estate described in the pleadings, except a tract of 120 acres which was found and adjudged to be the property of Matthew K. Sample. A decree was entered quieting the title of each of these parties as against the plaintiff and all of their co-defendants to the property in question. The petition then alleges as follows:

"That said journal entry as to these petitioners is false and fraudulent; that the same was obtained without their knowledge and consent, and by the procurement of the said J. M. Steele and the said M. K. Sample, and by the payment on their part of a large sum of money, to wit, \$1,900, to the said plaintiff in said suit, and by the connivance and collusion of said Steele and Sample and the said plaintiff in said suit to defraud these petitioners; that the said Demaris A. Duncan, Louisa E. Eyler, James A. G. Sample and George W. Sample were not nor was any of them ever served with summons in said suit, or in any manner notified of the pendency thereof, nor did they nor anyone of them ever enter an appearance in said suit, or authorize any person or persons whomsoever to enter an appearance for them or to file any paper for them in said suit, or to enter into any agreement for them as to any matter in said suit, or thereunto in any manner relating; that the said Lizzie Stewart, Ida Stewart, James Hayslip and Albert F. Hayslip and John F. Sample admit that they were served with summons in said suit, but say that they had information that said suit was brought for partition of the premises in plaintiff's petition in said suit described, which were all the lands of which said Matthew K. Sample had died seized, and that they did not then wish to join issue with the plaintiff and to deny her interest in said suit, but that they relied as they believed they had a right to rely upon the court to make to them and to each of them a just and equitable partition of their interests in said premises as the heirs at law of said Matthew K. Sample, deceased, and so relying upon the court to protect them in their said rights, they did not employ counsel and file answers in said suit; and they now believe but that for the fraud set forth in the first and second paragraphs hereof, imposed as well upon the court as upon these petitioners, they would have been by the court protected in all their rights therein; they deny that they filed, caused to be filed, or author-

ized any person to file for them, a certain paper purporting to be their answer therein, and filed on the 12th day of November, 1885, and they make the same denial as to a certain other paper purporting to be a demurrer, filed in said suit on the 15th day of March, 1886; that both of said papers are false as far as the same relate to these parties, and were so filed in fraud of their rights in said suit."

In the second count of the petition they allege an interest in the lands, and set forth a meritorious defense in the original action. They then ask to have the judgment entered in the original suit vacated and set aside, and all of them to come in and file an answer, to be heard in behalf of their several interests therein, and other proper relief. The defendants in this action filed a motion to require the plaintiffs to make their petition more definite and certain by the plaintiffs separately stating the claim and rights of each; second, to make their petition more definite and certain by setting out a full and complete copy of all the pleadings and judgment in the action wherein the judgment was rendered that the plaintiffs are seeking to vacate and annul; third, to make the petition more definite and certain by specifically stating all the facts on which the allegation is made that the defendants were in any way guilty of fraud in the procuring of the rendition of the judgment mentioned in the petition; and, fourth, by stating a full and complete answer which the plaintiffs proposed to file in the cause. This motion was denied, and the defendants then filed a demurrer, upon the grounds, first, that there was a defect in the parties plaintiff; second, that several causes of action were improperly joined; and, third, that the petition did not state facts sufficient to constitute a cause of action against the defendants. The demurrer was overruled, and the defendants, without waiting for the disposition of the case, bring this proceeding to reverse the ruling upon the demurrer.

*C. N. Sterry, and E. S. Bertram, for plaintiffs in error.*

*E. E. Ritchie, and R. W. McNeal, for defendants in error.*

The opinion of the court was delivered by

JOHNSTON, J.: This action was brought under §§ 568 and 570 of the civil code, to vacate a judgment alleged to have been obtained through the fraud of the plaintiffs in error. The questions in the case arise upon the ruling of the court upon the demurrer filed against the petition of the plaintiffs below. It was first contended that there was no joint cause of action in favor of the defendants below, and this is based on the statement in their petition that some of the defendants in the original action were never served with summons and made no appearance in that action, while others of the defendants were served and properly brought into court. It is said as to those who were never served, and who never entered their appearance in the case or authorized anyone to enter an appearance for them, that the judgment was absolutely void; while as to the other class, who were served, the judgment was only voidable; and so it is urged that the judgment rendered affected a part of the defendants in an entirely different manner from that in which it affected the others. It is contended that because the judgment was absolutely void as to some of them, the proper proceeding to set it aside was by a motion, under the last clause of § 575 of the civil code. It appears, however, that this proceeding was not brought under the last clause of § 575, nor were the defendants in error confined to that remedy. (*List v. Jockheck*, 45 Kas. 349, 748; same case, 27 Pac. Rep. 185; *Hanson v. Wolcott*, 19 Kas. 207.) The action is manifestly brought to set aside the judgment for "fraud practiced by the successful party in obtaining the judgment." The allegations of fraud apply to those not served as well as to those who were served; and all of the defendants in error were affected by the fraud as alleged to have been practiced, and all are entitled to relief against the judgment so obtained. The objection of misjoinder cannot therefore be sustained.

The next objection is, that the allegations respecting the fraud practiced are not sufficiently full and specific to constitute a good petition or require an answer. It is true that a



statement of the facts showing the fraud should be pleaded, and that mere conclusions are insufficient. It cannot be said, however, that only conclusions with reference to the fraud practiced have been set forth in the petition. It is charged that the judgment which purported to have been entered by agreement of the defendants in error was entered without their knowledge and consent, and that Steele and M. K. Sample paid \$1,911 to Elizabeth Sample in order to obtain the judgment, and thus defraud the defendants in error. They denied that the papers which were filed in the case in their behalf were ever filed by them or by any person authorized to file the same, and that they never entered into the agreement recited in the journal entry to have been made between them and the plaintiffs in error. Although the allegations with reference to the fraud are not as full and specific as they might have been, they are sufficient in our opinion to overcome the demurrer. It is substantially alleged that J. M. Steele and M. K. Sample paid \$1,900 to Elizabeth Sample to induce her to withdraw her claim upon the land and permit a judgment to be entered in their favor; and that they conspired together to have it appear that the defendants in error were present and agreeing to the judgment that was entered, when in fact they had no knowledge of the agreement or of the rendition of the judgment, and authorized no one to make the agreement or to consent to the judgment that was given. If the allegations made are established, it will show that a fraud was not only practiced upon the defendants in error, but also upon the court, as the judgment rendered would probably not have been given if the court had understood that all the parties were not represented and consenting.

There is considerable complaint that the petition is not sufficiently definite and certain in its allegations; but these objections cannot be cured in a review of a ruling upon the demurrer. We think the court might properly have required the defendants in error to have set out copies of the pleadings upon which the judgment sought to be vacated was founded, as the pleadings may throw some light on the character and

effect of the judgment. The court might properly, too, have required a fuller and more detailed statement of the times and manner in which the fraud was practiced; but, as has been stated, these objections are not now available. When the case is remanded for trial, the court will have an opportunity to require the defendants in error to make their petition more definite and certain in both particulars, and in that way overcome these objections.

We conclude that the demurrer to the petition was properly overruled, and therefore the ruling of the district court will be affirmed.

All the Justices concurring.

---

THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY  
v. JAMES M. RICHARDSON.

47	517
57	377

**RAILROAD COMPANY—Negligence—Fire—Findings.** In an action against a railway company to recover damages caused by fire escaping on the right-of-way of such company, the fact that the dry grass of the previous season was suffered to remain on the right-of-way is proper evidence for the jury, and they may find negligence from it. Such negligence is ordinarily a question of fact for the jury; and when the fire was caused by the operation of the railroad, and the jury make special findings, *inter alia*, that the negligence of the defendant consisted in the failure to properly clean its right-of-way, *held*, that under chapter 155 of the Laws of 1885 the defendant was not entitled to judgment upon such special findings, when the general verdict was for the plaintiff.

*Error from Labette District Court.*

**ACTION** by *Richardson* against the *Railway Company*, for loss by fire, alleged to have been caused by defendant's negligence. Judgment for plaintiff, at the October term, 1888. The defendant *Company* brings the case to this court.

*Geo. R. Peck, A. A. Hurd, and Robert Dunlap, for plaintiff in error.*

*Case & Glassee, for defendant in error.*

Opinion by GREEN, C.: This was an action to recover damages for the loss of certain property destroyed by fire. James M. Richardson owned 320 acres of land in Labette county, which he cultivated as a farm for raising fruit, grain, and stock. The St. Louis & San Francisco Railway Company owned and operated a line of railroad through this farm; and it is alleged that the railway company carelessly, negligently and unlawfully allowed and permitted weeds, grass and rubbish to accumulate and remain on its right-of-way, near to and along its track; that on the 26th day of February and the 1st day of March, 1887, while operating its line of railroad, it carelessly, negligently and unlawfully caused and permitted fire to escape from its engines or some part of its trains, which fire ignited the weeds and grass upon the right-of-way, communicated to the premises of the plaintiff, and destroyed his fences, grape vines, fruit trees, forest trees, and shade trees. The case was tried before a jury, and a verdict was returned for the plaintiff for \$421.67. The jury returned special findings of fact, showing that each one of the trains was properly handled; that there was a public highway running along the east side of the defendant's railway track where the fire escaped on the 26th of February; and that the fire caught on the east side of the railroad track, near the center of the highway. The jury found, too, that the right-of-way where the fire escaped was covered with grass. In answer to the question as to whether the fire was set out on purpose or escaped by accident, they answered: "No; carelessness." The findings are substantially the same as to fire of March 1st, except that the jury answered that there was no dry grass, weeds or other rubbish in the draw on the defendant's right-of-way, where the fire escaped, other than the ordinary growth of the past season. The jury found as to each fire that the defendant

had omitted to properly clean its right-of-way. There was a motion for judgment in favor of the defendant, upon the special findings, notwithstanding the general verdict. This motion was overruled, and judgment was entered upon the general verdict.

The record presents but a single question for our consideration: Did the court err in refusing to give the defendant judgment upon the special findings? It is contended by the plaintiff in error, that while the statute makes the setting out of a fire *prima facie* evidence of negligence, it does not change the rule of liability, but shifts the burden of proof from the plaintiff to the defendant; and therefore, where the evidence on the part of the defendant rebuts this presumption, and shows that the defendant carefully conducted its business, the verdict should be for the defendant. As an abstract proposition we might admit the correctness of the principle as stated; but it is a question as to whether the special findings establish such a state of facts as will relieve the railroad company from all liability under the statute. This court said, before the enactment of the statute:

“Negligence is a question of fact for the jury. It is for them to determine whether there has been any negligence, and its nature and degree. Even where the circumstances are all admitted, if there is any doubt as to what they prove, it is still a question for the jury. It is not the duty of the court to draw inferences from the evidence, but only to pronounce legal conclusions from facts admitted or properly found.” (*U. P. Rly. Co. v. Rollins*, 5 Kas. 187.)

In a later case it was said, that when the evidence shows an accumulation of dry grass and stubble, it is a question for the jury whether the accumulation is such, and under such circumstances, as to impute negligence. (*White v. Mo. Pac. Rly. Co.*, 31 Kas. 280.) We think it evident from the findings that the fires escaped on the right-of-way. This seemed to have been the theory of the railroad company, from the following special findings submitted to the jury, with others:

“13. What was the condition of the right-of-way of the

---

St. L. & S. F. Rly. Co. v. Richardson.

---

defendant at the place where the fire escaped—covered with grass or burned off? Ans. Covered with grass.

“14. Is it not a fact that the defendant company had taken precautionary measures to prevent fire from being set out on its right-of-way, by having its right-of-way burnt off during the winter before the fire occurred of February 26, 1887? A. Partially so.

“15. Was there any dry grass, weeds, rubbish lying, standing or being upon defendant's right-of-way at the time and place where the fire was set out on the 26th day of February? If so, state fully the quantity and height of any dry weeds, grass or other rubbish that was on defendant's right-of-way at said time and place. A. Yes; growth of 1886.”

The answers are the same as to the fire of March 1st. We think, therefore, that the findings show that the fires escaped on the right-of-way; and under chapter 155 of the Laws of 1885, (§ 1321 of the General Statutes of 1889,) the railroad company was *prima facie* guilty of negligence. (*Mo. Pac. Rly. Co. v. Merrill*, 40 Kas. 404; *Mo. Pac. Rly. Co. v. Cady*, 44 id. 633.) It is true that it has been held that “it is not negligence *per se* for a railroad company to permit standing grass and weeds to remain on its right-of-way;” (*K. P. Rly. Co. v. Butts*, 7 Kas. 308;) still there may be such a state of facts surrounding each particular case as will establish negligence; and when such facts do exist, it is proper to submit them to the jury.

The law in this class of cases ordinarily commits the question of negligence to the jury. The negligence imputed to the railroad company in this case is in the care of its right-of-way. It has been said in this class of cases that “the removal of combustible substance is quite as much a means of preventing the communication of fire from locomotives as the use of inventions for preventing the escape of fire from the locomotives themselves.” (Thomp., Neg. 162, and authorities there cited.) This question the jury passed upon, and found that the company omitted to clean its right-of-way, and returned a general verdict in favor of the plaintiff. We do not feel that we can disturb the judgment of the trial court based upon these

## Insurance Co. v. Wood.

special findings and the general verdict of the jury, especially when the occurrence of a fire caused by the operation of a railroad is by statute made *prima facie* evidence of negligence.

It is urged that, if the defendant below were guilty of negligence under the special findings, the plaintiff was guilty of a greater degree of negligence, because he took no precaution whatever to prevent fire. The special findings were that he pastured his premises. This, too, was a matter for the jury to determine, and not a question of law. (*K. C. Ft. S. & G. Rld. Co. v. Owen*, 25 Kas. 419; *St. J. & D. C. Rld. Co. v. Chase*, 11 id. 47; *Beach, Contrib. Neg.*, § 75.)

It is recommended that the judgment of the district court be affirmed.

By the Court: It is so ordered.

All the Justices concurring.

---

THE HOME INSURANCE COMPANY OF NEW YORK V.  
WILLIAM WOOD.

1. **TRIAL**—*Complete Record.* The record in this case examined, and *held*, that it affirmatively shows that it contains all the proceedings, evidence and instructions in the case, as tried in the court below.
2. **INSTRUCTIONS**—*No Error.* The instructions given and the instructions refused examined, and *held*, that the court committed no error in giving or refusing instructions.
3. **FINDINGS**, *Supported.* The evidence examined, and *held* to support the findings of the jury.

*Error from Rice District Court.*

THE facts are stated in the opinion. Judgment for plaintiff, *Wood*, at the July term, 1889. The defendant *Insurance Company* comes to this court.

*A. M. Lasley*, for plaintiff in error.

*C. F. Foley*, for defendant in error.

47	521
50	452
47	521
57	616
47	521
69	559

Opinion by STRANG, C.: March 10, 1887, the plaintiff company issued its policy of insurance to the defendant, agreeing to indemnify him against loss or damage by fire in the sum of \$1,000 — \$500 on his dwelling, and \$500 on household goods and other things therein, for the period of one year. January 8, 1888, the property was totally destroyed by fire. The company refused to pay the damages sustained by said loss, and on the 12th day of April, 1888, this suit was brought to recover for the loss sustained under said policy. The execution and delivery of the policy were admitted. The defendant in answer claimed, first, that the policy was void *ab initio* because of the fact that there were certain incumbrances in the form of mortgages upon the land before and at the time the policy was issued, and that the existence of said mortgages was not disclosed to the company, nor its agent, when said insurance was obtained; second, that there was at the time such insurance was obtained other insurance on said property, the existence of which was not disclosed to the company, nor to its agent; third, that the company was not liable because, in violation of a condition of the policy, the house was unoccupied when consumed by fire. The first of these propositions the plaintiff in error abandons in its brief, and says it will consider only the second and third of these questions. The case was tried by the court and a jury, and a verdict returned for the plaintiff below, in the sum of \$1,056.75. The jury also made the following special findings:

"1. When was the building referred to in the petition in this case burned? Ans. On the 8th day of January, 1888.

"2. How long after said building was burned before plaintiff made proof of loss, if any was made, to defendant? A. On the 17th day of January, 1888.

"3. When did the plaintiff make his proof of loss in this case, if any was made? A. Same as above mentioned.

"4. When did the proof of loss in this case reach the office of defendant in the city of New York? A. If it has been proved, don't know.

"5. What did the proof of loss, if any was made in this

## Opinion of the Court.

case, consist of? A. Statement made to defendant's adjusting agent.

"6. Was there any other insurance on the building referred to in the petition in this case at the time the defendant in this action issued its policy? A. Yes.

"7. On the day the defendant in this case issued its policy of insurance, did it know of the existence of any other policy of insurance on the property insured? A. Yes.

"8. On the day the policy was issued by the defendant in this case, did its agent Johnson actually know that there was a mortgage on the property covered by the policy and that the same was not paid? A. Yes.

"9. By whom and how was the building referred to in this case occupied at the time it was burned? A. By the plaintiff.

"10. Where was the family of the plaintiff residing at the time the building referred to in this case was burned? A. In said building; temporarily absent at the time it was burned.

"11. Where was the plaintiff sleeping and taking his meals at the time the building referred to was burned? A. At Mr. Ford's, in Sterling, Kas.

"12. Who had the key to the building referred to in this action and the possession thereof at the time the same was burned? A. Mr. Alfon had the key to the second room from the west, on the north side.

"13. What was the building in this action referred to worth at the time it was burned—that is, what was its market value? A. \$1,300.

"14. Was there any of the property described in the policy of insurance in this case that was not in the building at the time the same was burned? If so, what was it? A. Yes; one sewing machine.

"15. How much, if anything, do you allow for the loss of the building, if any, to the plaintiff? A. \$500, with interest at the rate of 7 per cent. per annum from the 17th day of March, 1888.

"16. How much, if anything, do you allow for the other articles mentioned in the policy (outside of the sum, if any, allowed for the loss of the building)? Give each item separately. A. \$500, with interest at the rate of 7 per cent. per annum from the 17th day of March, 1888, on the following articles, to wit:

"1 organ, 12 chairs, 1 parlor set (parlor bed-room) and bedding, 3 bed-room sets, 60 yards of carpet, wearing apparel, 1 cook stove, 1



parlor stove, 1 bed-room stove, 1 dining-room table, 1 breakfast table, cupboard ware.

"17. Was there more than one mortgage on the house referred to in the petition, at the time the defendant issued its policy of insurance on the building? If so, did defendant have any knowledge of both of them at the time it issued its said policy? A. Yes.

"18. Was there any waiver of proof of loss by the defendant in this action? If so, by whom was such proof waived, and when? A. Yes; to wit, on the 17th day of January, 1888, by the defendant's adjusting agent.

"19. If you answer the last question 'yes,' then state what such waiver consisted of. A. By the actions of the defendant's adjusting agent."

The first question raised in this case is one of practice. It is alleged that there is no case in this court, because the case-made does not show that it contains all the pleadings, proceedings, evidence, and instructions. It is held by this court that the case-made must affirmatively show that it contains all the pleadings, proceedings, evidence, and instructions, when all of these things are to be reviewed in this court. We think the case before us does affirmatively show that it contains all the evidence and instructions and other matters to be reviewed in this court. While it is the better practice to incorporate a direct statement in the body of the case-made, showing that it contains all of the matters to be reviewed here, yet it will be retained and reviewed by this court if it otherwise sufficiently shows that it contains everything to be reviewed in this court.

The first contention of counsel for plaintiff herein is, that there was other insurance on the property included in the policy sued on in this case when this policy was issued, and that the existence of such other insurance was not disclosed to the company nor its agent at the time the insurance in this policy was applied for. The company says that because the existence of such other insurance was not disclosed this policy was void. The jury found that the company knew of the existence of the other insurance when it issued the policy sued on. It is contended, however, that this finding of the jury is not supported by sufficient evidence, if it is supported by

---

Opinion of the Court.

---

any evidence. The other insurance complained of was in the Hartford Insurance Company, and it is admitted that the application for such insurance was taken and the policy therein countersigned by Mr. Johnson, the same agent who took the application and countersigned the policy issued by the plaintiff in error in this case, and that but a few weeks intervened between the dates of such policies. Mr. Johnson, the agent, testifies that, at the time he took the application for the policy sued on, he had forgotten the fact of having insured the same property only a few weeks before in another company, and that his attention was not called to such former insurance when the latter insurance was taken. Turning to the evidence of Mr. Wood, we find that he says the agent had knowledge of the former insurance; that when the first insurance was taken, the agent told him the property would bear other insurance; that afterward he met the agent on the street, and the agent asked him if he was not ready to take some additional insurance on his property, adding that he had several companies then, and could write him some more insurance on his property. Wood inquired what it would cost, and the agent told him he would go down to the office and see. Afterward, and without any further application on the part of Wood, the policy sued on was issued and delivered to Wood by Mr. Johnson. We think this evidence of Mr. Wood sufficient to support a finding that the company by its agent, Johnson, knew at the time it issued its policy of the other and former policy in the Hartford company on the same property.

The next contention of the plaintiff company is, that the house was permitted to become unoccupied, and was unoccupied when destroyed. Upon this question the jury found against the company, and say the house was occupied when consumed. Counsel says this finding is not supported by the evidence, and is against the evidence. We think this is a much closer question than the former one, and yet we think the evidence upon the question as to whether or not the house was occupied at the time of the fire is of such a character that

---

Insurance Co. v. Wood.

---

it should be submitted to a jury, and that the court was right in refusing to instruct the jury as a matter of law, under the evidence, that the house was at the time of the fire unoccupied. The question turns largely upon the intention of the defendant, Wood, and such intention must, in the absence of any express declaration of Wood in relation thereto, be gathered from the circumstances of the case, and its ascertainment, considering the character of the evidence in relation thereto, is, therefore, peculiarly within the province of the jury. The evidence shows that the furniture and household goods were still in the building when the fire occurred, though they were being packed in some of the rooms of the house so as to make vacant other rooms therein; that Wood had slept in the house until within a week or five days of the fire, and then went to Ford's to sleep because he was not well; that he was at the house each day while he slept away, and was there till evening the night of the fire. It also shows that Wood had given a key to a young man named Alfon, who was fixing one of the bed-rooms as a sleeping room for himself; that he had moved his bed and trunk in, but had not yet actually slept there, though he was there the early part of the night of the fire and changed his clothes. While it is not very clear whether or not the house was occupied at the time of the fire, we think the evidence on that point was properly submitted to the jury; and the jury having found that the house was occupied, this court would not be justified in saying the jury were not warranted under the evidence in so finding. There is an allegation of error in connection with the instructions given, and also with respect to the instructions refused. We think the instructions properly voice the law of the case, and cover all the questions raised by the special requests of the defendant.

We therefore recommend that the judgment of the court below be affirmed.

By the Court: It is so ordered.

All the Justices concurring.

S. A. BROWN *et al.* v. E. A. BARBER *et al.*

**CHattel Mortgages — When Fraudulent — Retention of Property by Mortgagor.** When, by the terms of two chattel mortgages, no power of sale is given to the mortgagor of certain live stock, but the mortgagor, with the knowledge and acquiescence of the mortgagees, makes sales of portions of the live stock, and buys other live stock and mingles it with the mortgaged stock, makes weekly shipments, and buys and sells and adds to and takes from the live stock originally mortgaged, until, after the lapse of a few months, the identity of the particular live stock mortgaged is lost, and the mortgagor cannot identify it; and the mortgagor uses, controls, buys and sells, and in all other respects treats the live stock as his own, and as if no mortgage existed, and applies the proceeds of the sales made at his own discretion, and does not render an account to the mortgagees of the amount or disposition of the proceeds of stated sales, such mortgages are, as a matter of law, fraudulent and void as to other creditors of the mortgagor.

*Error from Allen District Court.*

ACTION by E. A. Barber and George C. Barber, partners as *E. A. Barber & Co.*, against S. A. Brown and F. E. Parish, partners as *S. A. Brown & Co.*, to foreclose chattel mortgages executed by one Robbins, and recover property embraced therein from defendants. Judgment for plaintiffs. Defendants bring error. The facts appear at large in the opinion.

*J. D. McCleverty*, and *G. A. Amos*, for plaintiffs in error.

*J. B. F. Cates*, and *E. A. Barber*, for defendants in error.

Opinion by SIMPSON, C.: This is an action commenced by *E. A. Barber & Co.* in the district court of Allen county to foreclose certain chattel mortgages, executed by *E. S. Robbins*, and to recover of *S. A. Brown & Co.* certain personal property that they claim was embraced in the chattel mortgages made to them by Robbins. Robbins was engaged in buying, selling and shipping live stock, and resided on a large farm that he owned near the city of Humboldt. *S. A. Brown & Co.* and *E. A. Barber & Co.* are private banking firms, both

doing business in Humboldt, the bank of Brown & Co. being under the management of one T. W. Phelps. During the year 1886, and until some time in April, 1887, Robbins was depositing money and checking against the same, and from time to time receiving accommodation loans, and was permitted to overdraw his account in the banking house of S. A. Brown & Co. To secure S. A. Brown & Co., Robbins gave to them several chattel mortgages on live stock for loans and advances made to him by the banking house, all of which are set forth in the record, but only two of these mortgages are found and adjudged to be invalid in this action. One of these is dated January 13, and the other April 15, 1887. On the 13th day of January, 1887, Robbins borrowed of S. A. Brown & Co. \$3,000, and to secure the same gave a chattel mortgage on a large amount of live stock, consisting of horses, mules, and cattle. On or about the 15th day of April, 1887, Robbins ceased to do his banking business with the house of S. A. Brown & Co., and was at that time indebted to them, in addition to other amounts, in the sum of \$3,500, which was unsecured, and to secure it Robbins on that day executed and delivered to S. A. Brown & Co. a chattel mortgage on certain live stock, a portion of which was embraced in the one of date January 13th. After the execution of the mortgage of date April 15, 1887, Robbins ceased to do business with S. A. Brown & Co., and commenced to do his banking with E. A. Barber & Co., to whom he was indebted in the sum of \$2,600 on previous transactions. E. A. Barber & Co. advanced money at intervals from the 15th day of April, 1887, to July 23 of the same year, at which time he was owing them about \$4,000, and to secure it he gave them a chattel mortgage on a large number of horses and cattle. From July 23, 1887, until about the 10th day of August of the same year, E. A. Barber & Co. advanced Robbins additional sums of money, amounting to about \$4,000, for which they had no security. About that time they ascertained from S. A. Brown & Co. the amount of Robbins's indebtedness to them, and discovered the fact that S. A. Brown & Co. were holding chattel mortgages on a large part of Rob-

## Opinion of the Court.

bins's personal property. On the 9th day of August, E. A. Barber & Co. entered into a written agreement with Robbins, by which he agreed to give them as additional security for the first \$4,000 a first chattel mortgage on all his personal property not covered by any of the mortgages made to S. A. Brown & Co., and a second chattel mortgage on all his personal property embraced in the mortgages to S. A. Brown & Co., and to assign to E. A. Barber & Co. two life insurance policies of the face value of \$10,000 each, and to give them a second mortgage on all his real estate, amounting to 880 acres of land. The chattel mortgages were executed and delivered in pursuance of this agreement. On the 2d day of January, 1888, Robbins had a large number of cattle, horses, mules and hogs on hand, and had no feed for them. In this condition of affairs, he made a proposition to S. A. Brown & Co., whose mortgage covered some, if not a large portion of the same, to turn over to them the property covered by their mortgages; and, in pursuance of such agreement, they took possession of the live stock mentioned in the sixteenth special finding of the referee. The live stock on which E. A. Barber & Co. had a first mortgage was by Robbins placed in the custody of one Alderman, under a contract made by Robbins and Alderman for care and feed.

The case was by stipulation of parties and an order of the district court referred to W. L. Simons, Esq., to try the same and report his findings of fact and conclusions of law. In June, 1888, the referee made his report, and his findings of fact and conclusions of law are as follows:

"1. The plaintiffs, E. A. Barber and Geo. C. Barber, are, and ever since the 1st day of January, 1886, have been, partners doing business at Humboldt, Allen county, Kansas, under the firm-name of E. A. Barber & Co. The defendants S. A. Brown and F. E. Parish are, and ever since the 1st day of May, 1885, have been, partners doing business as bankers at Humboldt, Allen county, Kansas, under the firm-name of S. A. Brown & Co.; and that the defendant T. W. Phelps is and has been during all of said time the general agent of said S. A. Brown & Co., in charge of and managing their business.

---

Brown v. Barber.

---

The defendants E. S. Robbins and Mary J. Robbins were, on the 12th day of January, 1887, and have been ever since, husband and wife, each to the other; and that on said 12th day of January, 1887, they resided, and ever since have resided, upon section 25, in township 25, of range 18, in Allen county, Kansas; and said section 25 and also section 36 in the same township and range, on the said 12th day of January, 1887, constituted, and was occupied and used and ever since has constituted and been occupied and used by said E. S. Robbins as his farm; and from January 1, 1887, until August 3, 1887, said E. S. Robbins was engaged in farming, and raising, buying, selling and shipping live stock, such as horses, mules, cattle, and hogs.

"2. On the 12th day of January, 1887, the said E. S. Robbins executed and delivered to said S. A. Brown & Co. his promissory note of that date for \$3,000, at 90 days, with 12 per cent. interest per annum from its maturity, for money loaned by said S. A. Brown & Co. to said E. S. Robbins, being the note first mentioned and copied in the answer of the defendants S. A. Brown, F. E. Parish, and T. W. Phelps; and to secure the payment of said note said E. S. Robbins, on the 13th day of January, 1887, executed and delivered his chattel mortgage of that date, duly verified by affidavit thereon, to said S. A. Brown & Co., upon the following-described personal property, to wit: 25 head of horses, mares and geldings of all ages; 8 yearling colts; 14 work mules, all ages; 90 head of calves nearly one year old; 80 head of cows of all ages; 70 head of yearling past, steers and heifers; being the first chattel mortgage mentioned in said answer last named, and the same chattel mortgage verified as aforesaid, of which 'Exhibit A' attached to said last-mentioned answer is a copy. Said mortgage was duly filed in the office of the register of deeds in Allen county, Kansas, and duly entered on the records of chattel mortgages on the 15th day of January, 1887; that at the time said chattel mortgage was executed and delivered, all the property described therein, as above, was the property of said E. S. Robbins, and was then in his possession and situated on his farm described in the foregoing first finding, and was all of the property then owned by him of the horse, cattle or mule kind. On the day following the execution of said mortgage said E. S. Robbins, with the knowledge and consent of said S. A. Brown & Co., commenced, and, with such knowledge and consent of the said S. A. Brown & Co.,

continued from said time until the execution of the mortgage hereinafter mentioned in the sixth finding of this report, on the 23d day of July, 1887, to treat and deal with said mortgaged property as his own, and from day to day to exchange portions thereof for other stock and to sell other portions thereof, and to purchase other live stock of the same general kind and character, and turn such purchased stock among and mingle the same with said mortgaged stock promiscuously, in such a manner and to such an extent that the identity of said mortgaged stock was lost, and then to select out promiscuously from the aggregate lot or number so commingled, of the stock so purchased and the stock mortgaged as aforesaid, a number of head nearly equal to but less than the number so purchased, and ship such selected stock to Kansas City, Mo., and there sell them, and use the proceeds of such sales for his own use and benefit, and without accounting therefor to said S. A. Brown & Co. in any manner whatsoever; neither did said S. A. Brown & Co. request or expect him to account for such proceeds. From January 13, 1887, to April 15, 1887, purchases were made and added to, and sales and shipments were made from the '90 head of calves,' and the '70 head of yearlings past,' mentioned in said mortgage, until there remained on hand and in said E. S. Robbins's possession on April 15, 1887, as the remnants of said calves and yearlings past purchased, and said calves and yearlings past mortgaged, and commingled as aforesaid, about 100 head; but whether any, and if any, how many, of said 100 head were the same stock mentioned and described in said mortgage cannot be ascertained. At least, most if not all of said 90 head of calves and of said 70 head of yearlings past had been sold and shipped and disposed of as aforesaid before April 15, 1887. Between January 13, 1887, and April 15, 1887, said E. S. Robbins purchased from time to time 93 head of cows, and turned and commingled them, as and when purchased, promiscuously among the 80 head of cows mentioned in said mortgage, and also from time to time sold and shipped out of said commingled lot of cows 38 head; and had remaining on hand and in his possession on said 15th day of April, 1887, 135 head of cows, but how many of said 135 head were the same cows mentioned and described in said mortgage cannot be ascertained or determined. Between January 13, 1887, and April 15, 1887, said E. S. Robbins traded off at least four head of the said '25 head of horses, mares and geldings of all



---

Brown v. Barber.

---

ages,' and at least four head of said '14 work mules, all ages,' and at least two of said '8 yearling colts.'

"3. On the 15th day of March, 1887, the said E. S. Robbins executed and delivered to said S. A. Brown & Co. his promissory note of that date for \$525.50, at 90 days, with 12 per cent. interest per annum from its maturity, for money loaned by the said S. A. Brown & Co. to said E. S. Robbins; being the second note mentioned and copied in the answer of the defendants S. A. Brown, F. E. Parish, and T. W. Phelps; and to secure the payment of said notes said E. S. Robbins, on the 15th day of March, 1887, executed and delivered his chattel mortgage of that date, duly verified by affidavit thereon, to said S. A. Brown & Co., upon the following-described personal property, to wit: 1 mouse-colored jack, five years old, formerly owned by J. B. Stewart; 1 horse mule 7 years old, bay, weight about 1,000 pounds; 1 horse mule 7 years old, bay, weight about 1,000 pounds, mules formerly owned by J. Barrackman; being the second chattel mortgage mentioned in said answer, and the same chattel mortgage verified as aforesaid, of which 'Exhibit B' attached to said answer is a copy. Said mortgage was duly filed in the office of the register of deeds in Allen county, Kansas, and duly entered on the records of chattel mortgages, on the 16th day of March, 1887; that at the time said chattel mortgage was executed and delivered, all of the property described therein was the property of said E. S. Robbins, and was then in his possession and situated on his farm described in the foregoing first finding of fact, and was not owned by him on but purchased after January 13, 1887; and that subsequently to March 15, 1887 (of the precise time there is no evidence), said two horse mules were returned to and are now owned by said J. Barrackman; and said jack has been in possession of said S. A. Brown & Co. since January 2, 1888.

"4. On the 15th day of April, 1887, the said E. S. Robbins executed and delivered to said S. A. Brown & Co. his promissory note of that date for \$3,500, at six months, with 12 per cent. interest per annum from its maturity, for money loaned by said S. A. Brown & Co. to said E. S. Robbins, being the third note mentioned and copied in the answer of the said defendants S. A. Brown, F. E. Parish, and T. W. Phelps; and to secure the payment of said note said E. S. Robbins, on the 15th day of April, 1887, executed and delivered his chattel mortgage of that date, duly verified by affidavit thereon, to

## Opinion of the Court.

said S. A. Brown & Co. upon the following-described personal property, to wit: 8 mares and gelding (all ages) horses; 100 yearling steers and heifers, fat; 93 cows (all ages) and their increase, held on my farm about  $3\frac{1}{2}$  miles northeast of Humboldt; also, subject to first mortgage for \$3,000 given January 12, 1887, the following, to wit: 25 head horses, mares and geldings, all ages; 8 yearling colts; 14 work mules, all ages; 90 head of yearlings; 80 head of cows (all ages) and their increase; 70 head of steers and heifers coming two years old, being the third chattel mortgage mentioned in said answer, and the same chattel mortgage verified as aforesaid, of which 'Exhibit C' attached to said answer is a copy. Said mortgage was duly filed in the office of the register of deeds in Allen county, Kansas, and duly entered on the records of chattel mortgages on the 16th day of April, 1887. At the time said chattel mortgage was executed and delivered, on April 15, 1887, the said E. S. Robbins had in his possession on his said farm described in the foregoing first finding, and about  $3\frac{1}{2}$  miles northeast of Humboldt, Allen county, Kansas, and owned, (subject to such lien, if any, as then existed in favor of said S. A. Brown & Co. by virtue of the chattel mortgage mentioned in the foregoing second finding, on such portion thereof as was owned by said E. S. Robbins and located on said farm on the 13th day of January, 1887,) the following personal property, to wit: 31 head of horses, mares and geldings, of all ages; 8 yearling colts; 10 work mules, all ages; 135 cows, all ages; about 100 yearling steers and heifers, fat (but whether more or less than 100 did not appear from the evidence); 62 young calves, and no other stock of the horse, mule or cattle kind. Just what portion or how many head of the live stock owned by said E. S. Robbins, as aforesaid, on said 15th day of April, 1887, was the same stock mentioned in and covered by said mortgage mentioned in said second finding, the evidence does not disclose, and cannot be ascertained or determined; but at least 10 head of said horses, mares, and geldings, 2 yearling colts, and the larger number of said 135 head of cows, and most if not all of said yearling steers and heifers, fat, has been purchased and acquired by said E. S. Robbins after the execution of and were not included in said last-mentioned mortgage on January 13, 1887. There was not and never has been any mortgage given or dated January 12, 1887, on any of the property mentioned herein.

After the execution of said mortgage of the date of April 15, 1887, and from said date continuously until the execution of the mortgage hereinafter mentioned in the sixth finding, on July 23, 1887, the said E. S. Robbins, with the knowledge and consent of said S. A. Brown & Co., treated and dealt with all of said property on said farm on said 15th day of April, 1887, in all respects as his own, and from day to day exchanged portions thereof for other stock, and sold other portions thereof, and purchased other stock of the same general kind and character, and turned such purchased stock and said stock obtained by exchange as aforesaid among and mingled the same with what remained from time to time of said stock on said farm on said 15th day of April, 1887; and said E. S. Robbins commingled said stock promiscuously in such a manner and to such an extent that the identity of said stock on said farm on April 15, 1887, was lost; and said E. S. Robbins did continuously from April 15, 1887, to July 23, 1887, select out promiscuously from the aggregate lot or number of stock so commingled portions thereof, and shipped the same to Kansas City, Mo., and there sell them, and use and apply the proceeds of such sales to his own use and benefit. All of the foregoing was done with the full knowledge and consent of said S. A. Brown & Co.; and said E. S. Robbins did not account to said S. A. Brown & Co., nor did said Brown & Co. request or expect said E. S. Robbins to account to them, for said proceeds or any part thereof in any manner whatever. Just what portion of said stock on said farm April 15, 1887, remained on said farm and was owned by or in the possession of said E. S. Robbins on the 23d day of July, 1887, cannot be ascertained or determined.

"5. On the 21st day of June, 1887, the said E. S. Robbins executed and delivered to said S. A. Brown & Co. his promissory note of that date for \$1,270.82, at 30 days, with 12 per cent. interest per annum from its maturity, for a valuable consideration paid by said S. A. Brown & Co. to said E. S. Robbins; being the fourth note mentioned and copied in the answer of defendants S. A. Brown, F. E. Parish, and T. W. Phelps; and to secure the payment of said note said E. S. Robbins, on the 21st day of June, 1887, executed and delivered his chattel mortgage of that date, duly verified by affidavit thereon, to said S. A. Brown & Co., upon the following personal property, to wit: 140 head of hogs, which now average about 225 pounds each; 1 dark bay mule eight years

## Opinion of the Court.

old, 'Jack,' 1 dark bay mule nine years old, 'Pete' (mules known as Charles mules); being the fourth chattel mortgage mentioned in said answer, and the same chattel mortgage verified as aforesaid, of which 'Exhibit D' attached to said answer is a copy. Said mortgage was duly filed in the office of the register of deeds in Allen county, Kansas, and duly entered on the records of chattel mortgages on the — day of June, 1887. At the time said chattel mortgage was executed and delivered, on the 21st day of June, 1887, said E. S. Robbins owned, without any incumbrance, and had in his possession on his farm described in the foregoing first finding about and not exceeding 140 head of fat hogs of all ages, from small hogs or shoats up to a year or a year and a half old, and no other swine except a few small pigs; and also 2 dark bay mules, one eight years old, named 'Jack,' and the other nine years old, called 'Pete,' known as the 'Charles mules.'

"6. On the 23d day of July, 1887, said defendants E. S. Robbins and Mary J. Robbins executed and delivered to said plaintiffs, E. A. Barber & Co., their promissory note of that date for \$4,000, at 90 days, with 12 per cent. interest per annum from its maturity, for money loaned by said E. A. Barber & Co. to said E. S. Robbins and Mary J. Robbins. A copy of said note is attached to the petition of said plaintiffs and marked 'Exhibit A.' And to secure the payment of said note, said E. S. Robbins, on the 23d day of July, 1887, executed and delivered his chattel mortgage of that date to said E. A. Barber & Co. upon the following-described personal property, to wit: 395 head of cattle, of all ages, from calves up; 250 head of hogs, of all ages; being the first chattel mortgage mentioned in said petition, and the same chattel mortgage of which 'Exhibit B' attached to said petition is a copy. Said mortgage was duly filed in the office of the register of deeds in Allen county, Kansas, and duly entered on the records of chattel mortgages on the 25th day of July, 1887, at 7:15 o'clock A. M. At the time said chattel mortgage was executed and delivered, on July 23, 1887, said E. S. Robbins owned and had in his possession on his farm described in the foregoing first finding of fact between 300 and 350 head of cattle of different ages, from calves up; and about 200 head of hogs of all sizes and ages, from suckling pigs up to 18 months old; the exact number of said cattle and hogs, or of either, the evidence does not disclose. Said cattle consisted of cows of various ages, and heifers and steers one and two years

---

Brown v. Barber.

---

old, and calves of various ages. There were no other cattle or hogs owned by said E. S. Robbins, or on said farm, on July 23, 1887. There is now due, with interest computed to July 6, 1888, to said E. A. Barber & Co. from said E. S. Robbins and Mary J. Robbins, on said note, the sum of \$4,380. Said mortgage was taken and received in good faith by said E. A. Barber & Co., and without any actual notice or knowledge on their part that any person other than said E. S. Robbins had or claimed any interest in or lien upon any of said stock.

"7. On the 9th day of August, 1887, for the purpose of securing the payment of the note mentioned and described in the foregoing sixth finding of fact, said E. S. Robbins executed and delivered his chattel mortgage to said E. A. Barber & Co. upon the following personal property, to wit: 5 mules about 15½ hands high, bought of David Byrum, and known as the 'Byrum mules,' three and four years old; 20 head of mares, bought of George Millen, and known as the 'Millen mares,' branded on the left hip with a brand, and their increase for 1887, both colts foaled and to be foaled, also their increase for 1888; 4 head of mares, for which I traded with J. B. Charles, and known as the 'Charles mares,' and their increase for 1888; 3 head of yearling heifers, bought of Charles Baland; 1 yearling heifer, bought of J. M. Atwood; 1 steer calf, bought of N. Platt; 26 calves (steers and heifers), bought of S. J. Stewart during the spring and summer of 1887; 160 head of hogs, more or less, and their further increase, being all the hogs I now have on my place after deducting 140 head heretofore mortgaged to S. A. Brown & Co.; all my farming utensils and tools of every kind, character, and description, including wagons, buggies, carriages, plows, cultivators, harrows, rakes, mowing and reaping machines, stacking apparatus, and harness and tackle of all kinds; 5 head of thoroughbred short-horn bulls, from one to four years old; 1 large red cow, bought of J. H. Dayton, and known as the 'Wilcox cow,' and her calf for 1887, and also the calf she may have in 1888; 5 cows bought of D. P. Druning and their calves for 1887 and 1888; 1 cow bought of Doctor Henry; 14 head of colts foaled from my mares for the year 1887, and all the colts my mares may have for 1888; 8 head of 2-year-old colts coming three next spring, all geldings; 2 yearling (past) colts I got of Captain Whitaker, one a horse colt and one a mare colt; and all the calves calved by my cows prior to April 15, 1887;

## Opinion of the Court.

being the second chattel mortgage mentioned in the petition of said plaintiffs, E. A. Barber & Co., and the same chattel mortgage of which 'Exhibit C' attached to said petition is a copy. Said mortgage was duly filed in the office of the register of deeds in Allen county, Kansas, and duly entered on the records of chattel mortgages on the 11th day of August, 1887. At the time said chattel mortgage was executed and delivered said E. S. Robbins had in his possession on his farm described in the foregoing first finding of fact and owned about 200 head of hogs, of all ages and sizes, subject to such lien as attached to 140 thereof by virtue of the mortgage mentioned in the foregoing fifth finding as executed on June 21, 1887, and subject also to such lien, if any, as attached to said 200 head of hogs by virtue of the mortgage mentioned in the foregoing sixth finding as executed July 23, 1887; (said 200 head of hogs were the same hogs and pigs mentioned in said sixth finding.) And also had in his possession on said farm and owned said 5 Byrum mules; 18 mares and 1 horse bought of George Millen, known as the 'Millen mares,' branded on the left hip with a brand; and 2 Texas colts, the increase of two of those mares for 1887; said 4 mares known as the 'Charles mares;' 1 steer calf bought of N. Platt; 1 steer calf bought of J. H. Atwood; 26 calves (steers and heifers) bought of S. J. Stewart during the spring and summer of 1887; 4 wagons; 4 mowers; 1 rake; 1 reaper; 5 cultivators; 7 plows; 3 harrows; 1 wheat drill; 1 corn planter; 1 stalk cutter; 2 buggies; 1 carriage; 6 set of harness; 5 thoroughbred short-horn bulls from one to four years old; 1 large red cow, bought of J. H. Dayton, and known as the 'Wilcox cow,' and her calf for 1887 (a red bull calf); 5 cows bought of D. P. Druning, and their 5 calves for 1887; 1 cow bought of Doctor Henry; 12 native colts foaled from said E. S. Robbins's mares, 1887; 7 two-year-old colts past, geldings; 2 yearling colts past, one a horse colt, and the other a mare colt, bought of Captain Whitaker; and 5 calves calved by said E. S. Robbins's cows prior to April 15, 1887. Since August 9, 1887, four more Texas colts have been foaled by said Millen mares. All of said cattle hereinbefore mentioned in this finding as being owned by and in possession of said E. S. Robbins on said farm on August 9, 1887, was owned by him and in his possession on said farm on July 23, 1887, and was included in and subject to the lien of said mortgage of July 23, 1887.

"8. On the 9th day of August, 1887, for the purpose of

further securing the payment of the note mentioned and described in the foregoing sixth finding, said E. S. Robbins executed and delivered his chattel mortgage to said E. A. Barber & Co. upon the following personal property, to wit: 8 mares and geldings, all ages (horses); 100 head of yearling steers and heifers, fat, 93 cows, all ages, and their increase, held on my farm  $3\frac{1}{2}$  miles northeast of Humboldt; also 25 head of horses, mares, and geldings, all ages; 8 yearling colts; 14 work mules, all ages; 90 head of yearlings; 80 head of cows, all ages, and their increase; 70 head of steers and heifers coming two years old; 1 jack and 2 mules; 2 mules known as the 'Charles mules,' one a dark bay eight years old, named 'Jack,' and one a dark brown nine years old, named 'Pete;' and 140 head of hogs, weight 225 lbs. each. Also all my feed, whether in the stack, mow, crib, bin, shock, or standing in the field, whether on my home place, or on the Stewart, Tibbets, Hillard, Amos and Turner places; being the third chattel mortgage mentioned in the petition of said plaintiffs, E. A. Barber & Co., and the same chattel mortgage of which 'Exhibit D' attached to said petition is a copy. Said mortgage was duly filed in the office of the register of deeds of Allen county, Kansas, and duly entered on the records of chattel mortgages on the 13th day of August, 1887, at 8 o'clock A. M. At the time said chattel mortgage was executed and delivered said E. S. Robbins had in his possession on his farm described in the foregoing first finding and owned about 200 head of hogs of all ages and sizes, being the same hogs and subject to the same liens as found and determined in the next preceding (seventh) finding; and also 1 jack, and 2 mules known as the 'Charles mules,' one a dark bay eight years old, named 'Jack,' and one a dark bay nine years old, named 'Pete,' subject to the lien of the mortgage mentioned in the foregoing fifth finding of fact as executed June 21, 1887; and also the following cattle, subject to the lien of the mortgage mentioned in the foregoing sixth finding of fact as executed on July 23, 1887, to wit: 120 head of cows; about 90 head of steers and heifers, one and two years old; and quite a number (the exact number cannot be determined from the evidence) of calves, the increase of said 120 cows; and also 7 work mules, in addition to the 5 Byrum mules mentioned in the foregoing seventh finding; 7 two-year-old colts; 10 yearling colts, including said Whitaker colts; and 1 horse and 43 mares, including the Millen horse and mares and Charles mares mentioned in the forego-

## Opinion of the Court.

ing seventh finding; and there is nothing in said mortgage, of which said 'Exhibit D' attached to said petition is a copy, from which the particular 8 yearling colts, or the 8 mares and geldings, all ages (horses), or the 25 head of horses, mares and geldings (all ages), can be identified or determined. Whether or not the mules hereinbefore mentioned in this finding include the two Barrackman mules mentioned in the foregoing third finding, there is no evidence; neither is there any evidence as to the feed on hand August 9, 1887.

"9. On the 4th day of August, 1887, said E. S. Robbins executed and delivered to said S. A. Brown & Co. his promissory note of that date for \$500, at five months, with 12 per cent. interest per annum from date, for money loaned by said S. A. Brown & Co. to said E. S. Robbins; being the fifth note mentioned and copied in the answer of said defendants S. A. Brown, F. E. Parrish, and T. W. Phelps; and to secure the payment of said note said E. S. Robbins, on the 4th day of August, 1887, executed and delivered his chattel mortgage of that date to said S. A. Brown & Co. upon the following personal property, to wit: All of the crops or hay, either on hand or grown and harvested on his home place, and on the farms of Stewart, Millard, Tibbets, and Amos—those are leased by me, E. S. Robbins; being the fifth chattel mortgage mentioned in said answer, and the same chattel mortgage, verified as aforesaid, of which 'Exhibit E' attached to said answer is a copy. Said mortgage was duly filed in the office of the register of deeds in Allen county, Kansas, and duly entered on the records of chattel mortgages on the 5th day of August, 1887, at 8 o'clock A. M. The evidence does not disclose what crops or hay was on hand and covered by said mortgage, but the exact quantity, whatever it was, was all consumed by said E. S. Robbins in feeding his stock before January 2, 1888.

"10. On the 4th day of August, 1887, the said E. S. Robbins executed and delivered his chattel mortgage to said S. A. Brown & Co. upon the following personal property, to wit: All of the crops and hay belonging to said first party, either growing or made and harvested, situated on said first party's home place, and the Stewart farm, the Tibbets farm, the Millard farm, the Amos farm; being the sixth chattel mortgage mentioned in the answer of said S. A. Brown, F. E. Parrish, and T. W. Phelps, and the same chattel mortgage of which 'Exhibit F' attached to said answer is a copy. Said mortgage was duly filed and entered on the records of chattel



---

Brown v. Barber.

---

mortgages in the office of the register of deeds in Allen county, Kansas, on the 5th day of August, 1887, at 8 o'clock A. M. The evidence did not disclose the amounts or quantity of said crops or hay covered by said mortgage, but did disclose that, whatever that amount or quantity was, it was all consumed by said E. S. Robbins in feeding his stock prior to January 2, 1888.

"11. On the 9th day of January, 1888, said E. S. Robbins executed and delivered to said S. A. Brown & Co. his promissory note of that date for \$400, at 90 days' time, with 12 per cent. interest per annum from date; being the sixth note mentioned and copied in the answer of said S. A. Brown, F. E. Parrish, and T. W. Phelps; and to secure the payment of said note said E. S. Robbins, on the 9th day of January, 1888, executed and delivered his chattel mortgage of that date to said S. A. Brown & Co. upon the following personal property, to wit: 1 stallion, 10 years old, blind in right eye, named 'Victor Hugo;' 1 stallion, sorrel stallion, 10 years old, blind in right eye, named 'Ned;' 2 bay mares, one eight years old and one 10 years old, named 'Mollie' and 'Sofie,' being the same I bought of Charles Englehardt; 1 sorrel mare, eight years old, bought of Ben. Turner, named 'Jule;' being the seventh chattel mortgage mentioned in said answer, and the same chattel mortgage of which 'Exhibit G' attached to said answer is a copy. Said mortgage was duly filed and entered on the records of mortgages in the office of the register of deeds in Allen county, Kansas, on the 9th day of January, 1888. At the time said chattel mortgage was executed and delivered, said E. S. Robbins had in his possession on his farm described in the foregoing first finding and owned all of the stock described in said last mortgage; but owned said stallion 10 years old, blind in right eye, named 'Victor Hugo;' 2 bay mares, one eight years old and one 10 years old, named 'Mollie' and 'Sofie,' being the same I bought of Charles Englehardt, subject to the lien of the mortgage mentioned in the twelfth finding of fact hereinafter as executed February 21, 1887; and owned said sorrel stallion 10 years old, blind in left eye, named 'Ned;' 1 sorrel mare eight years old, bought of Ben. Turner, named 'Jule,' subject to the lien of mortgage mentioned in the thirteenth finding of fact in this report as executed October 11, 1887.

"12. On the 21st day of February, 1887, the said E. S. Robbins executed and delivered his two promissory notes of

## Opinion of the Court.

that date to one Paul Fisher, one for \$170, at one year, with 10 per cent. interest per annum from date, and if not paid when due, interest to draw 12 per cent. interest per annum from maturity, and the other for \$150, at eight months, with 10 per cent. interest per annum from date, and if not paid at maturity, interest to draw 12 per cent. from maturity; being the seventh and eighth notes mentioned and copied in the answer of said S. A. Brown, F. E. Parish, and T. W. Phelps; and to secure the payment of said two notes said E. S. Robbins executed and delivered his chattel mortgage, and dated on the 21st day of February, 1887, to said Paul Fisher, upon the following personal property, to wit: '1 dark bay stallion, nine years old this spring, blind in right eye, named 'Victor Hugo;' 2 bay mares known as the 'Englehardt mares;' being the eighth chattel mortgage mentioned in said answer, and the same chattel mortgage of which 'Exhibit H' attached to said answer is a copy. Said mortgage was duly filed and entered on the records of chattel mortgages in the office of the register of deeds in Allen county, Kansas, on the 2d day of March, 1887, at 11 o'clock A. M. At the time said chattel mortgage was executed and delivered, said E. S. Robbins owned and had in his possession on his farm described in the foregoing first finding of fact the personal property and stock mentioned and described in said mortgage, and said property was the only property of that description owned by or in possession of said E. S. Robbins. Before the commencement of this action said Fisher, for a valuable consideration, transferred said two notes and said mortgage to said S. A. Brown & Co., and they are the owners thereof.

"13. On the 11th day of October, 1887, said E. S. Robbins executed and delivered his promissory note of that date to one Paul Fisher for \$105, at 30 days, with 12 per cent. interest per annum from date, and if not paid when due, interest to bear 12 per cent. from maturity; being the ninth note mentioned and copied in the answer of said S. A. Brown, F. E. Parish, and T. W. Phelps; and to secure the payment of said note said E. S. Robbins executed and delivered his chattel mortgage of that date to said Paul Fisher upon the following personal property, to wit: 1 sorrel stallion, age nine years, called 'Ned,' and 1 sorrel mare, age eight years, called 'Jule;' said team known as the 'Turner team;' being the ninth chattel mortgage mentioned in said answer, and the same chattel mortgage of which 'Exhibit F' attached to said answer is

---

Brown v. Barber.

---

a copy. Said mortgage was duly filed and entered on the records of chattel mortgages in the office of the register of deeds of Allen county, Kansas, on the 13th day of October, 1887, at 8 o'clock A. M. At the time said chattel mortgage was executed and delivered, said E. S. Robbins had in his possession on his farm described in the foregoing first finding of fact and owned all of the stock and property described in said mortgage, and said stock and personal property was the only stock and property of that description in possession of or owned by said E. S. Robbins at the time said mortgage was executed and delivered. Before the commencement of this action said Fisher, for a valuable consideration, transferred said note and mortgage to said S. A. Brown & Co., and they have ever since said transfer been the owners thereof.

"14. On the 10th day of September, 1887, said E. A. Barber & Co., by written instrument of that date, released 125 head of hogs from the lien of the mortgage mentioned in the foregoing sixth finding, but what particular 125 head does not more definitely appear.

"15. On the 23d day of July, 1887, said E. S. Robbins had in his possession on his farm described in the foregoing first finding and owned 21 head of calves, the increase for 1887 of the cows mentioned in the mortgage executed April 15, 1887, as described in the foregoing fourth finding.

"16. On the 2d day of January, 1888, said S. A. Brown & Co., with the consent of said E. S. Robbins, took possession, under the chattel mortgages mentioned in the foregoing second, third, fourth and fifth findings, of the following-described personal property, and purchased of said E. S. Robbins, and kept, retained and applied the same as a payment upon the several notes and chattel mortgages mentioned in said second, third, fourth and fifth findings, at prices then agreed upon by and between said S. A. Brown & Co. and E. S. Robbins; and ever since said 2d day of January, 1888, said Brown & Co. have had, kept, and detained, and now have said personal property, to wit: 118 head of cows; 88 head of steers and heifers, most of which were, at the time, two years old past, and a few nearly two years old; 113 head of calves; 19 head of mares; 8 head of two-year-old colts (geldings); 9 head of yearling colts; 10 head of suckling (horse) colts; 2 head of suckling (mule) colts; 7 head of work mules; 1 jack; and 80 head of hogs and pigs of all ages. Afterward, and between January 2, 1888, and the commencement of this action, said

---

Opinion of the Court.

---

Brown & Co., with the consent of said E. S. Robbins, took possession of the following personal property, to wit: 3 mares and 2 stallions, under the chattel mortgages set out and described in the foregoing eleventh, twelfth and thirteenth findings, and have kept them ever since. Said Brown & Co. removed from the farm described in the foregoing first finding all the stock and property hereinbefore mentioned in this finding between January 2, 1888, and the commencement of this action, and have kept and detained all of said property away from said farm ever since such removal. On the 2d day of January, 1888, the fair and reasonable market value upon said farm of said personal property was and ever since has been as follows, viz.: Said 118 cows, worth \$13 per head; said 88 head of steers and heifers, worth \$10.50 per head; said 113 calves, worth \$6.50 per head; said 19 mares, worth \$50 per head; said 8 two-year-old colts (geldings), worth \$60 each; said 9 yearling colts, worth \$35 per head; said 12 suckling colts, worth \$25 per head; said 7 mules, worth \$75 per head; and said 80 head of hogs and pigs were worth \$500; said 3 head of mares, worth \$50 per head; no evidence as to the value of said jack and 2 stallions. One of said stallions is the same mentioned in the mortgage of February 21, 1887, to Paul Fisher, described in the foregoing twelfth finding; and the other stallion is the same described and included in the mortgage of October 11, 1887, to Paul Fisher, mentioned in the foregoing thirteenth finding; and 2 of said 3 head of mares are the same mares described and included in said mortgage of February 21, 1887, to said Fisher; and the other of said 3 mares is the same described and included in said mortgage of October 11, 1887, to said Fisher; and said 3 head of mares and said 2 stallions are the same described and included in the chattel mortgage of January 9, 1888, mentioned in the foregoing eleventh finding; and said jack is the same described in the chattel mortgage of March 15, 1887, mentioned in the foregoing third finding; and 2 of said 7 head of work mules are the same included and described as the 'Charles mules' in the mortgage of June 21, 1887, mentioned in the foregoing fifth finding. All of said cows, steers, heifers and calves were the same cattle owned by and in possession of said E. S. Robbins on his said farm on July 23, 1887, as found in the foregoing sixth finding, except a few of said calves that were calved by said cows subsequently to July 23, 1887. Whether any of said 80 head of hogs and pigs are the same mentioned as

small pigs in the foregoing fifth finding cannot be determined from the evidence; but said 80 head are the residue of the lot of hogs on said farm June 21, 1887, and their increase since said time, and such portion of the said 80 head as were in life August 9, 1887, were on said farm on said 9th day of August, 1887. Said 7 head of work mules does not include the Barrackman mules mentioned in the foregoing third finding. With the exception of such of said 80 head of hogs and pigs as may have been pigged since August 9, 1887, if any, all of said stock was in said E. S. Robbins's possession on said farm on August 9, 1887, at the time of the execution and delivery of the two mortgages of that date hereinbefore mentioned in this report. But what portion of said property was owned by or in possession of said E. S. Robbins on said farm on January 13, 1887, or April 15, 1887, cannot be definitely determined. One of said 8 head of two-year-old colts (geldings) and one of said 9 head of yearling colts are the same 2 colts mentioned in the foregoing seventh finding as bought of Captain Whitaker; 21 head of said calves are the increase of said cows before April 15, 1887, and 92 head of said calves are the calves calved after April 15, 1887, by said cows owned by and in the possession of said E. S. Robbins on said farm July 23, 1887.

"17. Before the commencement of this action, and after the removal of the property mentioned, and as stated in the next preceding finding, said E. A. Barber & Co. demanded said property of and from said S. A. Brown & Co. under the chattel mortgages of which 'Exhibits B, C and D' attached to plaintiffs' petition are copies; but said S. A. Brown & Co. refused to return or deliver up said property or any of it to said E. A. Barber & Co.

"18. The written contract of which 'Exhibit A' attached to the answer of E. S. Robbins is a copy expresses all that said plaintiffs agreed or promised to do in consideration of the execution of the chattel mortgages on August 9, 1887, as found in the foregoing seventh and eighth findings; and there was no other or additional or different agreement, either written or verbal, entered into either before or at the time of their execution and delivery, as a consideration therefor, except as stated in said written contract and chattel mortgages. Said E. S. Robbins failed and neglected to comply with the terms, provisions and conditions of said written contract on his part required to be performed. The assignments of the policies of

## Opinion of the Court.

insurance mentioned in said answer were not made, nor was the real-estate mortgage of which 'Exhibit B' attached to said answer is a copy executed or delivered under or in pursuance of said written contract; but said policies were assigned and said real-estate mortgage was executed and delivered under and in pursuance of another and different agreement, entered into by and between said E. S. Robbins and Mary J. Robbins and said E. A. Barber & Co., on September 10, 1887, and subsequently to the execution of said contract of which said 'Exhibit A' is a copy. As a part of said agreement of September 10, 1887, said E. A. Barber & Co. agreed to extend the time of payment of the \$4,000 note sued on in this action, and also a large amount of other indebtedness then owing by said E. S. Robbins and Mary J. Robbins to said plaintiffs from time to time, not exceeding two years, upon certain conditions. Said plaintiffs did not at any time, either by said agreement or any other, waive or release their right under said chattel mortgages mentioned in the foregoing sixth, seventh and eighth findings to declare said note due and take possession of the property described in said mortgages at any time, according to the terms of said chattel mortgages. Said E. S. Robbins having sold, disposed of and parted with the possession of a large portion of the property covered by and described and included in said chattel mortgages, and having allowed and permitted said property to be taken and removed from his farm described in the foregoing first finding, the said plaintiffs had a right to and did deem themselves insecure on said note, and had a right to and did declare said note due before the commencement of this action, and had a right to take possession of said property. Said plaintiffs have not declared said indebtedness, other than said note, due; and the consideration for the execution of said chattel mortgages of August 9, 1887, and of said real-estate mortgage, and of said assignments of said policies, or any of them, has not failed.

"19. On the 2d day of January, 1888, said E. S. Robbins placed in the possession of the defendant L. Alderman, who was then engaged in feeding and caring for horses, cattle, and other live stock, the following personal property, being a portion of the same property described and included in the mortgages mentioned in the foregoing seventh and eighth findings as executed on August 9, 1887, to wit: 1 mule (Byrum mule); 1 horse (Millen horse); 18 (Millen) mares; 6 colts from said 18 mares; 5 thoroughbred short-horn bulls; 3 mares (known

---

Brown v. Barber.

---

as the 'Charles mares'); 30 head of calves, and 9 head of cows, under a contract and agreement with said Alderman to be fed and cared for; and said Alderman has fed, kept and cared for said stock ever since said 2d day of January, 1888, under said contract and agreement, and still has possession thereof, except one of said 9 cows, which died in the spring of 1888, being the same cow described as the 'Wilcox cow' in the mortgage mentioned in the foregoing seventh finding. Said Alderman took care of and fed said stock from January 2, 1888, until April 1, 1888, and has pastured the same ever since April 1, 1888, and is still pasturing the same, except said cow known as the 'Wilcox cow,' and 4 of said mares which died some time in the spring of 1888 (the exact time did not definitely appear from the evidence). The feeding and keeping said stock as aforesaid from January 2, 1888, to April 1, 1888, was fairly and reasonably worth \$1.40 per month per head for said mares, horses, mules, and cows; and 70 cents per month per head for said colts and calves; and \$2 per month per head for said bulls; and the pasturing of said stock as aforesaid from April 1, 1888, to the date of the filing of this report, was and is fairly and reasonably worth 50 cents per head per month for said mares, horses, mules, cows, and bulls, and 25 cents per head per month for said colts and calves. There is now due from said E. S. Robbins to said Alderman for said feeding, keeping and pasturing to July 6, 1888, the sum of \$320, and no part of said sum has been paid; nor has said sum nor any part thereof been tendered to said Alderman, either by said plaintiffs or any other person. Said stock hereinbefore mentioned in this finding is not, nor is any part of it, the same stock mentioned in the foregoing sixteenth finding as sold and delivered to said S. A. Brown & Co.

"20. Said L. Alderman performed such labor in feeding and taking care of the live stock mentioned in the foregoing seventeenth finding subsequently to January 2, 1888, at the request of said S. A. Brown & Co., but said labor was performed by said Alderman simply as the servant of said S. A. Brown & Co.

"21. All of the live stock sold and turned over to said S. A. Brown & Co. by said E. S. Robbins on January 2, 1888, as found in the sixteenth finding, was taken by said Brown & Co. at the aggregate agreed price of \$5,800, or \$5,900, and applied as a payment on the notes mentioned in the second, third, fourth and fifth findings. And said Brown & Co. also

---

Opinion of the Court.

---

paid the additional sum of \$500 by assuming a liability of said E. S. Robbins of said amount; and, except as affected by the facts found in said sixteenth finding and hereinbefore in this finding, the amount of said four notes and the interest thereon is still a subsisting indebtedness from said E. S. Robbins to said Brown & Co. The three mares and two stallions turned over to said Brown & Co. subsequently to January 2, 1888, as found in said sixteenth finding, are held by said Brown & Co. under and by virtue of the chattel mortgages mentioned in the eleventh, twelfth and thirteenth findings; and, except as affected by the facts found in said three findings last mentioned, the three notes mentioned in said last three mentioned findings are still a subsisting indebtedness from said E. S. Robbins to said S. A. Brown & Co."

"CONCLUSIONS OF LAW.

"1. The chattel mortgage mentioned in the second finding of fact, being the mortgage of which 'Exhibit A' attached to the answer of S. A. Brown, F. E. Parish and T. W. Phelps is a copy, was before, on and during the 23d day of July, 1887, and ever since has been, and now is, void and invalid as to, against or affecting the said plaintiffs, E. A. Barber & Co., and was not on July 23, 1887, has not been since, and is not now, a lien upon any of the property mentioned in either the sixteenth or nineteenth finding of fact in this report, as against said plaintiffs.

"2. The chattel mortgage mentioned in the third finding of fact, being the mortgage of which 'Exhibit B' attached to the answer of said S. A. Brown, F. E. Parish and T. W. Phelps is a copy, is a good and valid and a first and best lien upon the live stock and personal property described in said mortgage, to secure the sum of \$525.50, and 12 per cent. interest thereon per annum from June 13, 1887; and said S. A. Brown & Co. are rightfully in the possession of said live stock and personal property last mentioned.

"3. The chattel mortgage mentioned in the fourth finding of fact, being the mortgage of which 'Exhibit C' attached to the answer of said S. A. Brown, F. E. Parish and T. W. Phelps is a copy, was before, on and during the 23d day of July, 1887, and ever since has been, and now is, void and invalid as to, against or affecting the said plaintiffs, E. A. Barber & Co., and was not on July 23, 1887, and has not been since, and is not now, a lien upon any of the personal prop-



erty mentioned in either the sixteenth or nineteenth finding of fact in this report, as against said plaintiffs.

"4. The chattel mortgage mentioned in the fifth finding of fact, being the mortgage of which 'Exhibit D' attached to the answer of said S. A. Brown, F. E. Parish and T. W. Phelps is a copy, is a good and valid and the first and best lien upon the two mules known as the 'Charles mules,' and the 'about and not exceeding 140 head of fat hogs of all ages, from small hogs or shoats up to a year or a year and a half old,' mentioned in the fifth finding of fact in this report, to secure the sum of \$1,270.82, and interest thereon from July 21, 1887, at 12 per cent. per annum.

"5. The note mentioned in the sixth finding of fact was due at the commencement of this action, and the plaintiffs, E. A. Barber & Co., are entitled to recover of and from the defendants E. S. Robbins and Mary J. Robbins on said note the sum of \$4,380.

"6. The chattel mortgage mentioned in the sixth finding of fact, being the mortgage of which 'Exhibit B' attached to the petition of said plaintiffs, E. A. Barber & Co., is a copy, was on the 23d day of July, 1887, ever since has been, and now is, a good and valid and first and best lien upon all the cows, heifers, steers and calves mentioned in the said sixth finding, and also upon all the 'few small pigs' mentioned in the fifth finding of fact, inferior and subject to the mortgage mentioned in the said fifth finding of fact upon the '140 head of hogs, fat,' mentioned in said fifth finding of fact to secure the payment of the sum of \$4,000, together with 12 per cent. interest per annum thereon from October 21, 1887; except, however, that the lien hereinbefore mentioned and found in favor of said plaintiffs in this conclusion of law is subject and inferior to the lien mentioned in the fifteenth conclusion of law in favor of defendant Alderman upon the live stock mentioned in the nineteenth finding of fact, as fed, kept and pastured by said Alderman, and so far as said live stock last mentioned is concerned. And plaintiffs are entitled to have the said chattel mortgage, of which said 'Exhibit B' attached to said petition is a copy, foreclosed.

"7. The chattel mortgage mentioned in the ninth finding is the first and best lien upon the crops and hay mentioned in said finding to secure the note described therein.

"8. The chattel mortgage mentioned in the seventh finding is the first lien upon all the mules, mares, the horses, colts,

---

Opinion of the Court.

---

and the increase of said mares, yearling colts, and two-year-old colts, the mowers, rake, reapers, cultivators, plows, harrows, drill, corn planter, stalk cutter, buggies, carriage, harness and wagons mentioned in said seventh finding; and a second lien upon all the cattle mentioned in the said seventh finding, and a second lien upon all the small pigs mentioned in the fifth finding that were a portion of the '200 head of hogs, of all sizes and ages,' mentioned in the sixth finding; and were also a portion of the '200 head of hogs, of all ages and sizes,' mentioned in the seventh finding; except, however, that the lien hereinbefore in this conclusion found in favor of the plaintiffs is also subject and inferior to the lien mentioned in the fifteenth conclusion in favor of defendant Alderman upon the live stock mentioned in the nineteenth finding of fact, and so far as said live stock last mentioned is concerned. And the plaintiffs are entitled to have said chattel mortgage last mentioned foreclosed.

"9. The chattel mortgage mentioned in the eighth finding is the second lien upon the jack and two mules known as the 'Charles mules,' and the five Byrum mules mentioned in the said eighth finding; and is the first lien upon the seven work mules mentioned in the said eighth finding; and is the third lien on all the cattle mentioned in said eighth finding, which are also mentioned in the seventh finding; and is also a second lien upon all the cattle mentioned in said eighth finding, which are not mentioned in said seventh finding; and is void as to the hogs, mares and geldings, horses and yearling colts mentioned in said eighth finding, except, however, that the lien hereinbefore in this conclusion found in favor of the plaintiffs is also subject and inferior to the lien mentioned in the fifteenth conclusion in favor of defendant Alderman upon the live stock mentioned in the nineteenth finding of fact. And the plaintiffs are entitled to have said chattel mortgage last mentioned foreclosed.

"10. The chattel mortgage mentioned in the tenth finding is the first lien (concurrent with the mortgage mentioned in the seventh conclusion) upon the crops and hay mentioned in said tenth finding to secure the debt mentioned in the mortgage described in said tenth finding.

"11. The chattel mortgage mentioned in the twelfth finding is the first and best lien upon the stallion and two mares mentioned in said twelfth finding to secure the debt mentioned therein.

"12. The chattel mortgage mentioned in the thirteenth finding is the first and best lien upon the stallion and mares described in said thirteenth finding to secure the debt mentioned therein.

"13. The chattel mortgage mentioned in the eleventh finding is a valid and second lien upon the 2 stallions and 3 mares described in said eleventh finding to secure the note mentioned therein:

"14. The defendants E. S. Robbins and Mary J. Robbins are not, nor is either of them, entitled to have the real-estate mortgage, or the chattel mortgages, or the assignments of the policies of insurance, or any or either of said instrument mentioned in the eighteenth finding cancelled or set aside.

"15. Said sum of \$320 due said L. Alderman for feeding, keeping, caring for and pasturing the live stock, as stated and found in the nineteenth finding, is a valid and the first and best lien upon the live stock mentioned in said nineteenth finding, as placed in the possession of said Alderman by said E. S. Robbins on January 2, 1888.

"16. Said L. Alderman is not entitled to a lien upon any of the live stock or property mentioned in any of the findings in this report for his labor and services or any portion thereof done and performed as found in the twentieth finding:

"17. The possession of said S. A. Brown & Co. of the 118 head of cows; 83 head of steers and heifers; 113 head of calves; 8 head of two-year-old colts (geldings); 1 yearling (the Whitaker mare) colt; 10 suckling (horse) colts; 2 suckling (mule) colts; 5 head of work mules (not the Charles mules), as found and stated in the sixteenth finding, was on the 2d day of January, 1888, ever since has been, and now is, wrongful and unlawful, as against the said plaintiffs' right and lien, as found and stated in the sixth, seventh and eighth findings, and the fifth, sixth and seventh conclusions; and said plaintiffs are entitled to the possession of said property under their chattel mortgages of which 'Exhibits B, C, and D' attached to their petition are copies, and to a foreclosure of said mortgages and sale of said property, and to a judgment and decree against said S. A. Brown & Co. for the immediate possession of said property, or for the value thereof, as found and stated in the sixteenth finding, together with interest upon such value from February 9, 1888, the time of the commencement of this action; said judgment for the value, however, not to exceed the said sum of \$4,380 found due said

## Opinion of the Court.

plaintiffs in the sixth finding; and plaintiffs are entitled to a judgment against said S. A. Brown & Co. for the costs of this action.

"18. The defendants S. A. Brown & Co. are rightly in possession of the following personal property mentioned in the sixteenth finding, to wit: 19 head of mares, all of the 9 head of yearling colts, except the (Whitaker) mare colt, the 2 mules known as the 'Charles mules,' the jack, the 80 head of hogs and pigs of all ages, the 2 stallions, 2 (Englehardt) mares, and the (Turner) mare.

"19. The personal property mentioned and referred to in the fifteenth conclusion shall be by said Alderman delivered to the sheriff of Allen county, Kansas, and by said sheriff sold as upon execution, and the proceeds of such sale applied to the payment of, first, the amount found due said Alderman in the nineteenth finding; second, the costs of such sale; third, the remainder to the plaintiffs, on the amount found due them in the sixth finding.

"20. The wagons, mowers, rake, reaper, cultivators, plows, harrows, wheat drill, corn planter, stalk cutter, buggies, carriage and harness mentioned in the seventh finding shall be by said E. S. Robbins delivered to the sheriff of Allen county, Kansas, and by said sheriff sold as upon execution, and the proceeds of such sale applied to, first, the costs of such sale, and the remainder to the plaintiffs, upon the amount found due them in the sixth finding.

"21. The personal property mentioned and referred to in the seventeenth conclusion shall be by said S. A. Brown & Co. delivered to the sheriff of Allen county, and by said sheriff sold as on execution, and the proceeds of such sale be applied, first, to the payment of the costs of such sale; second, to the payment of the amount remaining due the plaintiffs on the amount due them as found in the sixth finding; third, to the payment of the costs of this action; and the remainder, if any, to said S. A. Brown & Co.

"22. If a sufficient amount be not received from the sales mentioned in the nineteenth, twentieth and twenty-first conclusions to satisfy the costs of such sales and of this action, and the amounts found due said Alderman and said plaintiffs as stated in the sixth and nineteenth findings, then execution shall issue to said sheriff to collect the residue of said costs of this action and amount due plaintiffs from the defendants E. S. Robbins, Mary J. Robbins, and S. A. Brown & Co. And

in case of refusal or failure of said S. A. Brown & Co. to deliver the property or any portion thereof as stated and required in the twenty-first conclusion, execution shall issue against said Brown & Co. for the value (as found in the sixteenth finding) of such portions not delivered."

S. A. Brown & Co. filed a motion to have the referee set aside a portion of the findings of fact and conclusions of law, and to grant them a new trial. This motion was directed against the second, fourth, sixth and seventh findings of fact, and the first, third, sixth, eighth, ninth, seventeenth, twenty-first and twenty-second conclusions of law. This motion was also made by Robbins and wife and by Alderman. The motions were overruled by the referee. Similar motions were then made in the district court, and E. A. Barber & Co. filed a motion to confirm the report of the referee. On the hearing of these motions, the court overruled those of S. A. Brown & Co., Robbins and wife, and Alderman, and sustained the motion of E. A. Barber & Co., with some modifications. The final judgment is as follows:

"1. The court requires the plaintiffs to pay one-half of the fees and charges allowed the referee for his services herein, and the defendants S. A. Brown and F. E. Parish the other half of said referee's fees and charges.

"2. The court modifies so much of the twenty-second conclusion of law in said referee's report as follows: 'If a sufficient amount be not received from the sales mentioned in the nineteenth, twentieth and twenty-first conclusions to satisfy the costs of such sales and of this action, and the amounts found due said Alderman and said plaintiffs, as stated in the sixth and nineteenth findings, then execution shall issue to said sheriff to collect the residue of said costs of this action and amount due plaintiffs from the defendants E. S. Robbins, Mary J. Robbins, and S. A. Brown & Co. That portion of said conclusion is not allowed.' With said modification, the court orders and adjudges that the said report be and the same is hereby confirmed.

"And thereupon the court does consider, order and adjudge that the plaintiffs have and recover of the defendants E. S. Robbins and Mary J. Robbins the sum of \$4,340, with interest thereon at the rate of 12 per cent. per annum from July

---

Opinion of the Court.

---

6, 1888, and costs of suit as hereinafter provided, less the one-half of the referee's fees taxed to plaintiffs.

"And it is further ordered and adjudged, that the plaintiffs have and recover of the defendant E. S. Robbins the possession of 4 wagons, 4 mowers, 1 reaper, 5 cultivators, 7 plows, 3 harrows, 1 wheat drill, 1 corn planter, 1 stalk cutter, 2 buggies, 1 carriage, 6 sets harness; and that said E. S. Robbins is hereby ordered to deliver said property above described to the sheriff of Allen county, Kansas; and said sheriff is commanded to sell the said property as upon execution; and it is further ordered that the proceeds be applied as follows: 1st. To the payment of the costs of making said sale. 2d. The remainder to be paid to the plaintiffs upon the judgment herein rendered in their favor against E. S. Robbins and Mary J. Robbins.

"It is further considered, ordered and adjudged, that the said L. Alderman was and is now entitled to the possession of the property mentioned and described in the nineteenth conclusion of law and nineteenth finding of fact in said referee's report, to wit: 1 (Byrum) mule; 1 (Millen) horse; 17 (Millen) mares; and 3 (Charles) mares; 6 colts from said Millen mares; 5 thoroughbred short-horn bulls; 30 head of calves, and 8 head of cows, under his claim for feed therefor; but the said Alderman is hereby required to turn over and deliver to the sheriff of Allen county, Kansas, all of said property, (excepting such as have died since he took possession of them, to wit, 1 pony and 1 cow,) the same to be by the said sheriff sold as on execution; and it is ordered that the proceeds of such sale be applied as follows: 1st. The sum of \$320 thereof to be paid to said L. Alderman in satisfaction of his claim for the care and feed of said stock, as found by the referee in the nineteenth finding of fact and fifteenth conclusion of law. 2d. The remainder to be paid to the said plaintiffs on their judgment herein rendered against E. S. Robbins and Mary J. Robbins.

"It is further considered, ordered and adjudged, that the plaintiffs have and recover of the defendants S. A. Brown and F. E. Parish the possession of 118 cows, 88 head of steers and heifers, 113 calves, 8 head of two-year-old colts, 1 yearling colt (the Whitaker colt), 10 suckling horse colts, 2 suckling mule colts, 5 head of work mules. And the said S. A. Brown and F. E. Parish are hereby ordered to deliver the said property above mentioned to the sheriff of Allen county, and said sheriff is ordered to sell the same as upon execution;

and it is further ordered that the proceeds of said sale be applied as follows: 1st. To the payment of the costs of making said sale and the costs of this action. 2d. To the payment of the amount remaining unpaid to the plaintiffs on the judgment rendered herein in their favor against E. S. Robbins and Mary J. Robbins. 3d. The remainder, if any, to be paid to the said S. A. Brown and F. E. Parish.

"In case of the refusal or failure of the said S. A. Brown and F. E. Parish to deliver said property to said sheriff, or in case a return of said property cannot be had, it is considered, ordered and adjudged that the plaintiffs do have and recover of said S. A. Brown and F. E. Parish the sum of \$4,340, the value of said property, together with 7 per cent. interest per annum thereon from the 6th day of July, 1888, as found and stated by said referee; which judgment shall be satisfied by said S. A. Brown and F. E. Parish paying into court an amount of money sufficient to pay the plaintiffs the remainder due on their judgment against E. S. Robbins and Mary J. Robbins, after crediting the proceeds of the sales hereinbefore ordered.

"In case a part only of said property is delivered by said S. A. Brown and F. E. Parish to the sheriff of Allen county, as hereinbefore ordered, and a part or portion thereof be not delivered by them, and the proceeds arising from the sales of said portion delivered to said sheriff be not sufficient to pay said judgment in favor of said plaintiffs against E. S. Robbins and Mary J. Robbins, after applying the proceeds of the sales hereinbefore ordered, said judgment against S. A. Brown and F. E. Parish shall be satisfied by their paying into court a sum that will be, together with the application of the proceeds of said sales hereinbefore ordered, sufficient to pay said judgment of plaintiffs against said E. S. Robbins and Mary J. Robbins: *Provided, however*, Said sum shall not exceed in amount the value of said property not turned over, as found by the referee, together with 7 per cent. interest thereon from July 6, 1888. And in case of the failure of said S. A. Brown and F. E. Parish to pay said amount, then said plaintiffs shall have an execution against said S. A. Brown and F. E. Parish for the amount remaining due them on their said judgment against said E. S. Robbins and Mary J. Robbins: *Provided, however*, Said execution shall not be for a greater sum than the value of the property, as found by the referee, that

---

Opinion of the Court.

---

the said S. A. Brown and F. E. Parish may fail to turn over, together with 7 per cent. interest thereon from July 6, 1888.

"It is further ordered and adjudged by the court, that the referee be and is hereby allowed the sum of \$301.25 for his services and expenses in this case. It is further ordered, that the plaintiffs pay one-half of said referee's fees, and judgment is hereby rendered against said plaintiffs for the sum of \$150.68, and that the other half of said referee's fees and expenses of said referee be paid by said S. A. Brown and F. E. Parish, and judgment is hereby rendered against them for the sum of \$150.67.

"It is further adjudged that the defendant Alderman recover of the plaintiffs his costs herein, taxed at \$——; and it is further adjudged that the plaintiffs recover of the defendants S. A. Brown and F. E. Parish, partners as S. A. Brown & Co., their costs incurred in their suit against the defendants E. S. Robbins and Mary J. Robbins, taxed at \$——; it being the true intent and meaning of this judgment, as regards the question of costs, that the defendants respectively shall be liable only for the costs incurred in the defense of their branch of the case."

S. A. Brown & Co. alone have brought the case here for review. Their first cause of complaint, stated in general terms, is, that certain findings of fact made by the referee are not sustained by any evidence, and they specially attack so much of the second finding, which holds that Robbins, with the knowledge and consent of S. A. Brown & Co., used the mortgaged property (referring to the mortgage of January 13) as his own, and disposed of it for his own benefit, so that the identity of the stock was lost and destroyed before the 23d day of July; that, between the 13th day of January and the 15th day of April, Robbins had disposed of 38 head of cows mentioned in said mortgage, and had purchased and mingled with the remainder 93 head of cows, and had remaining in his hands April 15, 135 head of cows, but how many of said 135 head were the same cows mentioned in said mortgage cannot be ascertained or determined; that, on the day following the execution of the mortgage of date January 13th, Robbins, with the knowledge and consent of S. A. Brown & Co., con-



tinued from said time until the execution of the mortgage of date July 23, 1887, to treat and deal with said mortgaged property as his own, etc. The construction given the latter part of the finding by counsel for plaintiffs in error is, that Robbins sold a part of the mortgaged property on the 14th day of January; but we think that the finding does not so state. The proper construction of the finding is, that from the day following its execution—the 13th of January—until the 23d day of July, Robbins continued to treat and deal with the mortgaged property as his own; not that he made a sale of any part of it on the 14th day of January. There is evidence to show that after January 13th, and until the 15th of April, Robbins had disposed of some of the property, and this is admitted by the plaintiffs in error in their brief. The general trend of the evidence and the facts proved is toward the conclusion that S. A. Brown & Co. permitted Robbins to do as he pleased with reference to the sale and disposition of the mortgaged property.

The objection to the fourth finding of fact goes to substantially the same point. In the sixteenth finding it is said, "that all of said cows, heifers, steers and a lot of calves that Brown & Co. got from Robbins were the same that Robbins had in his possession July 23, the date of Barber & Co.'s mortgage." It is claimed that this part of the finding is not supported by any evidence, but we find in the recorded evidence of Robbins himself, who was a hostile party and witness as against E. A. Barber & Co., repeated declarations that he was buying, selling and shipping indiscriminately, and that his only aim was to keep on hand a number corresponding to the number mortgaged; and he said with reference to a lot of calves, especially, that was covered by a mortgage of S. A. Brown & Co., and in response to a question about reserving calves for E. A. Barber & Co., why it was that they were not separated from the balance of these calves, he said it was impossible for him to pick out those identical calves.

In a word, and without going further into the details of a most voluminous record, it seems to us that the general course

of dealing between Robbins and S. A. Brown & Co., and Robbins's habit of buying, shipping and selling cattle at his own will and pleasure, shipping sometimes as often as three times per week; his invariable custom, as far as developed by the record, of mingling his recent purchases with the stock on hand that was covered by these mortgages; added to his positive statement that he did sell certain stock covered by these mortgages and then bought others, his idea being that if he had the number called for in the mortgages on hand it did not make any difference as to whether they were the identical cattle or not, all concur in supporting the special findings of the referee, against the attacks of the plaintiffs in error. All these objections were reviewed both by the referee and a painstaking and laborious district court, and they must be held here to be conclusive of the facts established, for this, in addition to the other reasons: The legal conclusion derived from these special findings of fact, which is now the subject of the contention of counsel for plaintiffs in error, is, that S. A. Brown & Co.'s mortgage of April 15th is no lien, and passed no title to the stock they got from Robbins on January 2, 1888, as against E. A. Barber & Co.'s mortgages. This legal conclusion is based upon the fact that after Robbins executed and delivered to S. A. Brown & Co. the mortgages of date January 13 and April 15, 1887, Robbins, with the knowledge and consent of S. A. Brown & Co., treated the property as his own, shipping parts of it at various times, constantly buying to add to it, and constantly selling parts of it, until the identity of the particular live stock mortgaged was absolutely destroyed, and never accounting to Brown & Co. for sales of it. This legal conclusion seems to be supported by cases decided by this court and other final tribunals. In the case of *Leser v. Glaser*, 32 Kas. 546, this citation from the 17th American Law Review, 350 *et seq.*, is approved:

"All cases in which a power of sale of the goods by the mortgagor is provided for are therefore to be tested by the question whether such sales are to be made in his own behalf, and at his own discretion, and with the control of the pro-

ceeds reserved to him? or whether they are to be made solely in pursuance of the trust as a real one, that is, for the benefit of the grantee or mortgagee, and with provision that the proceeds shall be applied on his debt."

This citation was subsequently approved by this court in the case of *Implement Co. v. Schultz*, 45 Kas. 52.

An examination of the mortgages of January 13 and April 15 shows that no power of sale is given to the mortgagor, but on the contrary it is expressly provided in both instruments that the mortgagor shall continue in peaceable possession of the goods and chattels, "and he engages that they shall be kept in as good condition as the same now are," but the findings of the referee set forth the acts of both the mortgagor and mortgagees respecting the manner of sales, the custody and management of the mortgaged property, and the disposition of the proceeds of the various sales made from time to time of parts of the property. In this case, as in that reported in the 45th Kansas, the proceeds of sale were used by Robbins, without special regard to the mortgage debts. They are alike in another respect, to wit: "The resident agent of the mortgagees knew the manner in which the business was being conducted, and never made any objection thereto." And it can be said in this case as in that:

"By these findings a case is presented in which the power of sale in the mortgagor is recognized and acquiesced in, and this power of sale, and the application of the proceeds of such daily sales, are made by the mortgagor on his own behalf, and at his own discretion, the proceeds being subject to his absolute control, and the sales are not made and the proceeds are not applied solely in pursuance of the object and purposes of the chattel mortgages for the benefit of the mortgagees."

The course of dealing pursued by Robbins, with the knowledge and acquiescence of the mortgagees, S. A. Brown & Co., permitted Robbins to have the same control over the property, to exercise the same right to sell it or trade it, and to make an application of the proceeds of sale, or to make a disposition of the property received in trade, as if the chattel mortgages had never been executed. It is not alleged that the chattel mort-

---

Dissenting Opinion.

---

gages were of fraudulent origin; it may be that they were executed in good faith, but the subsequent conduct of both mortgagor and mortgagees now renders them obnoxious to the test of validity maintained by this court. By the course of dealing pursued by Robbins, with the knowledge and acquiescence of S. A. Brown & Co., the identity of the mortgaged property was changed, by buying and selling, by addition and subtraction, by mingling newly-purchased stock with those on hand at the time the mortgages were executed, until there was such a confusion of goods that Robbins himself, much less S. A. Brown & Co., could not point out the particular stock covered by their mortgages. We therefore conclude that the conclusions of law based on the findings of the referee are correct, and recommend that the judgment of the district court be affirmed.

By the Court: It is so ordered.

HORTON, C. J., and JOHNSTON, J., concurring.

VALENTINE, J.: I concur in affirming the judgment of the court below, but I still dissent from the decision of this court, and concur in the decision of the court below in the case of *Implement Co. v. Schultz*, 45 Kas. 52, 56, which is cited in this case seemingly as authority.

I. In that case the party in whose favor this court decided, and against whom the district court decided, was simply an *attaching creditor*, founding his claim to the property in controversy solely upon an *attachment* which could not be held to be good except upon the theory that *fraud* had been committed by the defendant in that action, while *in fact* no such fraud had been committed; while in this case there is *no attaching creditor nor any attachment*, and the party in whose favor the district court decided, and in whose favor this court now decides, *had and has the undoubted right to the property in controversy* unless the party against whom the district court decided, and against whom this court now decides, had and has a paramount right to the property by virtue of certain chattel mortgages.

II. In that case there was mortgaged property *that could be identified beyond all question* ample and sufficient to pay all of the mortgage debt remaining due and unpaid, which property was converted into money by a receiver appointed by the district court; and the proceeds thereof were ample and sufficient to pay the remainder of the mortgage debt; while in the present case much of the mortgaged property was sold by the mortgagor, and similar property purchased by him, and so mingled with the remainder of the mortgaged property, if there were any remainder, that *the identity of the mortgaged property had become and was lost*; and therefore it could not possibly be used in paying the mortgage debt.

III. In that case, *fraud* had to exist to sustain the *attachments*, while in this case there are no attachments, and it can make no possible difference whether any fraud has at any time existed or not with regard to the mortgages of the party against whom the court below decided and against whom this court now decides, for such mortgages cannot be enforced, for the reason that the identity of the mortgaged property is lost. Of course, I concur in the case of *Leser v. Glaser*, 32 Kas. 546, cited in the foregoing opinion.

## JANUARY TERM, 1892.

## PRESENT:

HON. ALBERT H. HORTON, CHIEF JUSTICE.

HON. DANIEL M. VALENTINE, } ASSOCIATE JUSTICES.  
HON. WILLIAM A. JOHNSTON, }

---

THE STATE OF KANSAS, *on the relation of W. W. Martin, v.*  
LYMAN U. HUMPHREY, *as Governor of the State of Kan-*  
*sas, et al.*

STATE AGENT—*Compensation—No Appropriation—Mandamus.* In the absence of any specific appropriation by the legislature to pay for the services of a state agent appointed under the provisions of chapter 176, Laws of 1877, (§§ 5932-5935, Gen. Stat. of 1889,) the supreme court will not compel, by *mandamus* or otherwise, the governor, auditor and attorney general to enter into or execute any contract with such agent for his compensation.

*Original Proceeding in Mandamus.*

THE facts sufficiently appear in the opinion herein, filed January 9, 1892.

*P. J. Coston*, and *Curtis & Safford*, for plaintiff.

*John N. Ives*, attorney general, for defendants.

The opinion of the court was delivered by

HORTON, C. J.: On the 11th day of March, 1891, W. W. Martin was appointed by Hon. Lyman U. Humphrey, as governor of the state and by the state senate, then assembled, confirmed as agent of the state, to prosecute the claims of the state against the United States, pursuant to an act of the legislature of the state, approved March 3, 1877, chapter 176,

---

The State, *ex rel.*, v. Humphrey.

---

Laws of 1877, (§§ 5932-5935, Gen. Stat. of 1889.) After his confirmation, W. W. Martin was commissioned by the governor as agent. Subsequently, and before the commencement of this action, he requested the governor, the auditor and the attorney general to enter into an agreement with him as to what his compensation as such agent should be under the provisions of §§ 3 and 4, chapter 176, Laws of 1877, (§§ 5934 and 5935, Gen. Stat. of 1889.) The officers refused to enter into any agreement or contract. This is an original proceeding in this court to compel the governor, the auditor and the attorney general of the state to enter into a contract with W. W. Martin, as requested. At the session of the legislature of 1891, chapter 182 of the Laws of 1872, relating to the salaries of state officers, judges, and officers of the legislature, was repealed. An attempt was also made to repeal §§ 3 and 4, chapter 176, Laws of 1877, §§ 5934 and 5935 of the Gen. Stat. of 1889. (Laws of 1891, ch. 181, § 17.) The title of said chapter 181 reads: "An act to establish the salaries of state officers, their assistants and clerks, judges, officers and employes of the legislature." The title is very similar to the title of an act of the legislature approved March 2, 1868, and amended by chapter 182, Laws of 1872. The contention is, that there is nothing in the title of chapter 181, Laws of 1891, that refers in any way to the state agent, or to his salary or compensation, and therefore that the part of § 17 of chapter 181, Laws of 1891, which attempts to repeal §§ 5934 and 5935, Gen. Stat. of 1889, is unconstitutional. The following authorities are cited: *The State v. Barrett*, 27 Kas. 213; *Harlan v. Territory of Washington*, 3 Wash. Ter. Rep. 131. We do not think it necessary to pass upon the constitutionality of the part of § 17, chapter 181, Laws of 1891, referred to.

At the session of the legislature for 1879, the following statute was passed:

"Every officer or agent of the state who shall be empowered to expend any public moneys, or to direct such expenditures, is hereby prohibited from making any contract for the erection

or repair of any building, or for any other purpose, whereby the expenditure of any greater sum of money shall be contemplated, agreed to, or required, than is expressly authorized by law." (Laws of 1879, ch. 166, § 132, March 20th; Gen. Stat. of 1889, ¶ 6674.)

Subsequently the legislature adopted chapter 103, Laws of 1886. The title is as follows: "An act relating to state officers and agents, and defining certain crimes and providing punishment therefor." Section 1 reads:

"That any officer or agent of the state who shall be empowered to expend any public moneys, or to direct such expenditures, is hereby prohibited from making any contract for the erection or repair of any building, or for any other purpose, whereby the expenditure of any greater sum of money shall be contemplated, agreed to, or required, than is expressly authorized by law; and any officer or agent of the state violating this law shall be deemed guilty of embezzlement of the amount in excess of that expressly authorized by law, and upon conviction shall be punished by confinement and hard labor not exceeding five years, or in the county jail not less than six months." (Gen. Stat. of 1889, ¶ 6675.)

No appropriation was made by the legislature in 1891 to pay for the services of the state agent. The appropriations heretofore made for such an agent have been exhausted. If the agent is to receive any compensation, it must be paid by the treasurer upon warrants of the auditor. Such payment cannot be made without a specific appropriation. (*Martin v. Francis*, 13 Kas. 22; *The State, ex rel., v. Stover*, ante, p. 119.) It is doubtful whether any part of the lands granted by the United States to the state for school purposes can be used or appropriated for any other than school purposes. (Const., art. 6, § 3.) It has been the practice to pay the state agent in money, even for any lands secured, notwithstanding the words of the statute. Lands are not given for the services of the agent. The state agent can proceed in the performance of his duties under his appointment, and it will be presumed that the legislature will properly compensate him for any services, valuable or useful to the state, which he may render. Even



---

The State, *ex rel.*, v. Humphrey.

---

if a contract were entered into between the state agent and the governor, auditor, and attorney general, it could not be enforced by *mandamus*, nor could damages be recovered from the state, or the officers of the state, for any breach thereof. Such a contract, even if entered into, would be of no value, unless the legislature should make a specific appropriation to carry out its terms. This court will not compel by *mandamus* a useless or vain thing to be done.

In the absence of an appropriation by the legislature to pay the compensation of the state agent, even if it were ruled that § 17 of chapter 181, Laws of 1891, repealing §§ 5934 and 5935, were unconstitutional, we would not compel any contract to be entered into or agreed upon. Without any specific appropriation therefor, the spirit, if not the letter, of § 132, chapter 166, Laws of 1879, and § 1, chapter 103, Laws of 1886, would be violated or impinged on by the execution of the contract demanded. Paragraph 5934, Gen. Stat. of 1889, provides that "Such agent shall be allowed such compensation for his services as may be agreed upon between the governor, auditor and attorney general of the state and himself, not to exceed 10 per centum upon the amount [of money] secured to the state." No appropriation having been made to pay for such compensation, the officers of the state cannot bind the state or the legislature by any contract. Said § 5934 permits a contract to be made, but there is no fund from which any compensation can be paid, and therefore the compensation is not expressly authorized or provided for by law; at least, no money is supplied or appropriated to pay any compensation to the state agent.

The peremptory writ will be denied.

All the Justices concurring.

HARRY AUSTIN V. THOMAS JONES *et al.*

47	566
51	152

**PLEADING—*Supplemental Petition.*** Where the facts existing at the time of and before the trial, in any case, would authorize the plaintiff to recover, provided they were properly pleaded and proved, but some of them, which were properly pleaded but are not sufficient to authorize a recovery, took place prior to the commencement of the action, and the others, which are not pleaded and are not sufficient to authorize a recovery, took place afterward, the plaintiff may, under § 144 of the civil code, set forth in a supplemental petition, upon such terms as to costs as the court might prescribe, the facts which took place after the commencement of the action; and it would be error for the court to refuse to permit the same to be done.

*Error from Shawnee District Court.*

**EJECTMENT.** A sufficient statement of the facts appears in the opinion. November 19, 1888, judgment for defendants, *Jones* and two others. The plaintiff, *Austin*, comes here.

*A. Bergen*, and *Edwin A. Austin*, for plaintiff in error.

*G. C. Clemens*, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action in the nature of ejectment, and for rents and profits, brought in the district court of Shawnee county on October 27, 1884, by Harry Austin against Thomas Jones, Lizzie Jones, and Nathaniel Jones, to recover the west half of the northeast quarter of section 34, in township 12 south, of range 15 east, in said county. E. D. Jones was afterward, and on May 16, 1885, made a party defendant. Afterward, and on July 20, 1885, a demurrer of the defendants to the reply of the plaintiff was sustained by the court, and on October 18, 1885, the plaintiff, as plaintiff in error, brought the case to this court for review, making the defendants below defendants in error; and on October 8, 1887, the judgment of the district court was reversed, and the cause remanded for further proceedings. (*Austin v. Jones*, 37 Kas.

327, *et seq.*) The original petition was in form an ordinary petition in ejectment, and for rents and profits. The answer of the defendants set up as a defense to the plaintiff's action certain tax deeds; and the plaintiff's reply is copied in full in the case of *Austin v. Jones*, *supra*. After the case was returned from the supreme court to the district court, and on October 27, 1888, the plaintiff produced and asked leave of the court to file a supplemental petition, which reads, omitting caption and signature, as follows:

"Comes now said plaintiff, and for his supplemental petition, leave of court being first had to file the same, shows: That since the commencement of this suit there has been filed and recorded in the office of the probate judge of Shawnee county, Kansas, a duly-authenticated copy of the last will and testament of Alonzo Child, deceased, executed and proved in the city and county of New York, in the state of New York, according to the laws of the state of New York, together with the probate thereof by and in the surrogate's court in and for the county of New York, in the state of New York, with a duly-authenticated copy of proceedings of said surrogate's court in relation thereto; and that by said will, probate and proceedings of said court, duly recorded as aforesaid, William Dean, sole executor of the last will and testament of Alonzo Child, deceased, was authorized to sell and convey the land described in plaintiff's petition; that since the commencement of this suit, and subsequent to the filing and recording of said last will and testament and the probate thereof and proceedings in relation thereto, as aforesaid, said William Dean, sole remaining executor under said will, and in pursuance of the power and trust therein vested in him, made, executed and delivered to Edwin A. Austin his deed of conveyance as such sole remaining executor of the lands described in the plaintiff's petition, and since receiving said deed said Edwin A. Austin has made, executed and delivered to the plaintiff herein his deed of conveyance, conveying said lands to the said plaintiff; that prior to the commencement of this suit said Edwin A. Austin had made, executed and delivered his certain other deed of conveyance of said lands to this plaintiff for a valuable consideration, and prior to the execution and delivery of said first deed said Edwin A. Austin had contracted with said William Dean, as executor of the last will and testament of Alonzo Child, deceased, for the purchase of

---

Opinion of the Court.

---

said lands, and had paid to said Dean as executor aforesaid the purchase-money and consideration therefor, and said William Dean as executor aforesaid had made, executed and delivered to said Edwin A. Austin his certain deed of conveyance therefor; that prior to the commencement of this suit, and prior to the execution and delivery of said first deed by Edwin A. Austin to this plaintiff, said Edwin A. Austin had for a valuable consideration received a deed of conveyance of said lands, made, executed and delivered by one Pearley A. Child to said Edwin A. Austin; that prior to the commencement of this suit, and prior to the execution and delivery of said deeds by Pearley A. Child and said William Dean as executor aforesaid, the title to said lands, so far as the same appears of record in the office of the register of deeds of Shawnee county, Kansas, in which said land is situate, appears to be in said Pearley A. Child, and that although there appeared of record a deed purporting to be made, executed and acknowledged by one Peabody A. Child to said Alonzo Child, said Edwin A. Austin nor this plaintiff had no knowledge or information prior to the commencement of this suit that said Pearley A. Child had conveyed said land by deed made, executed and delivered by him prior to his said conveyance of the same to said Edwin A. Austin; that by reason of the record aforesaid, said Edwin A. Austin and this plaintiff were induced by the advice of counsel to rely on said deed by Pearley A. Child to Edwin A. Austin as conveying the legal title to said premises, and neglected to cause said duly-authenticated copy of the last will and testament of Alonzo Child, deceased, and of the probate thereof to be recorded in the office of and on the journals of the probate court of Shawnee county, before the execution and delivery of said first deed from William Dean as executor aforesaid; that since the commencement of this suit, and at the last term of this court, this plaintiff has discovered for the first time that said Pearley A. Child had, prior to the execution and delivery of his said deed to Edwin A. Austin, made, executed and delivered his certain deed of conveyance of said land to said Alonzo Child, since deceased, and that the register of deeds in recording and indexing the record of said deed, erroneously recorded and indexed the same as having been made, executed and acknowledged by Peabody A. Child, thereby misleading said Edwin A. Austin and this plaintiff. Wherefore plaintiff prays that he may be permitted to set up and show the facts herein alleged in addi-

tion and in supplement to plaintiff's petition, and that he have relief as prayed for in his original petition."

This supplemental petition was duly verified by affidavit. The court overruled the motion for leave to file this supplemental petition, and refused to permit it to be filed. Afterward, and on November 19, 1888, a trial was had before the court and a jury, which resulted in a general verdict of the jury and a judgment for costs by the court in favor of the defendants and against the plaintiff; and the plaintiff again, as plaintiff in error, brings the case to this court for review.

The first question presented by counsel for consideration in this court is, whether the court below erred or not in overruling the plaintiff's application for leave to file his supplemental petition. For the purposes of this question it is perhaps wholly unnecessary to state any of the facts which the evidence introduced on the trial tended to prove or disprove; and still we might say that the evidence introduced and offered on the trial tended to prove among other things the following: On January 15, 1873, and prior thereto, the original patent title to the property in controversy was in Pearley A. Child. After that time, and prior to the commencement of this suit, he executed one deed for the property to Alonzo Child, the record of which deed, however, shows that it was executed by *Peabody A. Child*, and not by *Pearley A. Child*, and afterward and before the commencement of this suit Pearley A. Child executed another deed for the property to E. A. Austin. Prior to the execution of this last-mentioned deed Alonzo Child died; and after his death William Dean, the executor of his last will and testament, executed two deeds for the property to E. A. Austin, one before the commencement of this action and the other afterward; and E. A. Austin executed two deeds for the property to the plaintiff, Harry Austin, one before the commencement of this action and the other afterward. Prior to the commencement of this action certain proceedings were had in the surrogate's court of the county and state of New York relating to the last will and testament of Alonzo Child, deceased,

---

Opinion of the Court.

---

and to his executors; and since the commencement of this suit certain other proceedings were had in the probate court of Shawnee county in this state relating to the same matters. The foregoing relates to the plaintiff's title. The defendant's title is founded upon certain tax deeds which, for the purposes of the question now under consideration, if not for the purposes of the entire case, must be considered as absolutely void. The defendants, however, have the actual possession of the property, which is some evidence of title, and casts the burden of proving a better title upon the plaintiff. Section 144 of the civil code provides as follows:

“Either party may be allowed, on notice, and on such terms as to costs as the court may prescribe, to file a supplemental petition, answer or reply, alleging facts material to the case, occurring after the former petition, answer or reply.”

This court has repeatedly and uniformly held that supplemental pleadings may be filed, within the provisions of the foregoing section. (*Porter v. Wells*, 6 Kas. 453; *Clark v. Spencer*, 14 id. 398; *Simpson v. Voss*, 31 id. 227; *Williams v. Moorehead*, 33 id. 609; *Dreilling v. National Bank*, 43 id. 197.) See especially the case of *Williams v. Moorehead*. It would seem that the principal objections urged against this supplemental petition are, that the plaintiff asked leave to file it “precisely four years after the commencement of the action;” and that it constituted a departure from his original case, and an attempt to set forth a cause of action which he did not have at the beginning of the suit. We do not think that these objections are sufficient. As long as the suit continues undisposed of, the parties have the right under § 144 of the civil code to file supplemental pleadings, provided, of course, that they can bring themselves within the provisions of such section, even if it should be four or more years after the commencement of the action before they ask to file their supplemental pleading. Besides, the plaintiff in this case did not attempt by his supplemental petition to set up a new or independent cause of action, but simply attempted to set forth facts which took place subsequently to the commencement of his action,

---

Austin v. Jones.

---

for the purpose of perfecting or making better his original cause of action. The principal facts and nearly all the facts upon which the plaintiff seeks to recover took place prior to the commencement of the action, and the facts taking place afterward were intended to be used only in connection with those which took place prior thereto. It is possible under the facts of this case that the plaintiff should have recovered independent of his supplemental petition, for it does not require much of a title or estate to enable a party to recover as against a party having no title or estate except possession; but for the purposes of this case it is unnecessary to go into a consideration of this matter, for upon any theory the judgment of the court below must be reversed and the cause remanded for a new trial. Suppose that in any case the entire facts existing at the time of and before the trial would authorize the plaintiff to recover, provided they were properly pleaded and proved; but suppose that some of them, not sufficient to authorize a recovery, took place prior to the commencement of the action, and the others, also not sufficient to authorize a recovery, took place afterward: must the plaintiff be precluded from setting forth the subsequent facts in a supplemental petition, and be thereby defeated in the action? We think not, and we decide this case upon this theory.

The judgment of the court below will be reversed, and the cause remanded for a new trial.

All the Justices concurring.

THE CHICAGO, KANSAS & NEBRASKA RAILWAY COMPANY V. ERNEST BROQUET.

47	571
79	548
47	571
81	117

1. **EMINENT DOMAIN—Appeal—Evidence.** Upon an appeal from a proceeding to condemn a right-of-way for a railroad, testimony of the amount awarded by the commissioners is not admissible in evidence, and a statement made by the court in its charge to the jury, informing them of the amount so awarded by the commissioners, is unwarranted and erroneous.
2. ——— *Measure of Damages.* The measure of damages in such a case is the difference between the market value of the tract from which the right-of-way is taken immediately before and after the time when the land was actually condemned and appropriated.
3. **STATEMENT OF COURT—Prejudicial Error.** One of the controverted questions on the trial of the appeal was the ownership of the land taken. Before the trial the railway company made a written offer to allow judgment to be taken against it in favor of B. for \$1,000 and costs. The offer was not accepted, and the parties proceeded to trial. After the evidence had been offered and the charge of the court had been given, the court stated in the presence and hearing of the jury that "the Chicago, Kansas & Nebraska Railway Company has filed a paper in this case in which it recognizes Ernest Broquet as defendant or party in interest herein, and in which it made a certain offer to settle with said Broquet for damages to the land in question." *Held,* That, under the issues and circumstances of this case, the making of the statement was prejudicial error.

*Error from Norton District Court.*

CONDEMNATION PROCEEDING. Judgment for defendant, *Broquet*, September 12, 1888. The plaintiff *Railway Company* brings the case here. The facts appear in the opinion.

*M. A. Low*, and *W. F. Evans*, for plaintiff in error.

*John R. Hamilton*, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J.: This was an appeal from a condemnation proceeding instituted by the Chicago, Kansas & Nebraska Railway Company to obtain a right-of-way for its railroad through lands in Norton county. The commissioners con-



---

C. K. & N. Rly. Co. v. Broquet.

---

demned a right-of-way through a 10-acre tract of land, and the quantity deemed necessary for the route, and which was taken, was  $1\frac{7}{10}$  acres. The land taken was valued by the commissioners at \$1,200, and they assessed damages to the  $8\frac{21}{100}$  acres not taken at \$300. The commissioners were unable to ascertain who were the owners of the land, and made an award to "unknown owners" of \$1,500. The report of the commissioners was filed on December 16, 1887, and on December 19, 1887, the railway company took an appeal from the award. On April 10, 1888, Ernest Broquet filed a petition in the appeal, setting up title to the land in himself, and asking for damages in the sum of \$3,000. This petition was stricken from the files by the court, and the reason for this action does not clearly appear from the record. It appears that Ernest Broquet, at his own request, was made a party defendant, and W. H. Boys was also treated as a defendant, and was represented by an attorney appointed at the instance of the court, but the reason for this appointment is not shown by the record. The cause was tried with a jury, and a verdict was returned in favor of Ernest Broquet, awarding him the sum of \$1,683.41.

Errors are assigned on the rulings of the court in charging the jury. There were two controverted questions submitted to the jury: one was as to the ownership of the land at the time of its appropriation, and the other was as to the amount of damages suffered by the owner or owners. In one of the instructions, the court stated to the jury the amount awarded by the commissioners for the land taken and for the resulting damages to the part not taken. The award made by the commissioners was not admissible in evidence, and the court was not warranted in presenting the amount of the allowance as a fact to the jury. When an appeal is taken, the case is tried *de novo* upon new evidence, and the award of the commissioners is no more competent than would be the former verdict of the jury upon an appeal from a justice of the peace to the district court. It is only the opinion of the commissioners as to the damages sustained, and the statement of the

---

Opinion of the Court.

---

amount awarded by them is hearsay evidence, which is not admissible, whether stated by a witness or by the court in its charge. (*Railroad Co. v. Dwelle*, 44 Kas. 509.) We are referred to *Railroad Co. v. Kuhn*, 38 Kas. 104, as justifying this instruction; but in that case the court did not inform the jury what the amount of the award was; it only gave a rule for the computation of interest, stating that if an award of damages greater than a certain sum was allowed, interest should be awarded; otherwise, none should be allowed. The sum mentioned was the amount allowed by the commissioners, but this fact was not called to the attention of the jury. In this case the amount was not given as a basis for calculating interest, but was a flat statement of what the commissioners deemed to be a proper allowance for the land taken and the damages done.

There is also a complaint as to the rule given for the measurement of damages. In fixing the time for the valuation of the land, the court mentioned January 20, 1888, whereas in another place it is said, and the record shows, that the land was condemned and appropriated December 16, 1887. The compensation should be ascertained and the damages assessed as of the time when the property was actually appropriated, and the correct measure of damages was the difference between the market value of the tract through which the right-of-way was laid immediately before and immediately after the time when the property was actually taken. There is some confusion in the evidence, as well as in the charge of the court, with respect to when the right-of-way was condemned and appropriated. While this error of itself might not have been sufficient to reverse the judgment, it should be corrected if another trial is had, as the value of property might greatly change in the period between December 16, 1887, and January 20, 1888.

Error is also assigned on remarks made by the court in the hearing and presence of the jury, with respect to an offer of compromise. The railway company made an offer to allow judgment to be taken against it in favor of Broquet for \$1,000, and costs. This offer was not accepted by Broquet,

and they afterward proceeded to trial, and one of the principal grounds of contention was that Broquet was not the owner of the land. Testimony was offered upon that question, and a special interrogatory was submitted to the jury with reference to the fact, and the court instructed the jury that the burden of proof was upon Broquet to show that he was the owner of the land on December 16, 1887, and unless they found him to be the owner at that time, the verdict must be for the railway company. Notwithstanding this, the court stated in the presence of the jury that "the Chicago, Kansas & Nebraska Railway Company has filed a paper in this case in which it recognizes Ernest Broquet as defendant or party in interest herein, and in which it made a certain offer to settle with said Broquet for damages to the land in question." As the offer of compromise was not accepted, it could not be given in evidence, and should not have been mentioned on the trial. (Civil Code, §§ 523, 528.) In view of the issue which had been presented as to the right of Broquet to any damages, and the testimony given tending to show ownership in another, the statement made by the court, that the company had by its written proposal to allow a judgment recognized Ernest Broquet as an owner, and had made an offer to compromise with him, was prejudicial error.

For the errors mentioned the judgment will be reversed, and cause remanded for a new trial.

All the Justices concurring.

## JAMES GOODACRE V. L. D. SKINNER.

47	575
e76	5

1. **MORTGAGE — Foreclosure — Jury Trial.** In an action to foreclose a mortgage, a surety on the note secured filed an answer that did not state a defense to the action, and demanded a jury trial. *Held*, It was not error in the trial court to refuse a jury trial.
2. ——— **Supplemental Pleadings.** Supplemental pleadings can only be filed by leave of the court, after reasonable notice.

*Error from Sedgwick District Court.*

THE opinion states the case.

*Bentley & Ferguson*, and *Dale & Wall*, for plaintiff in error.  
*Harris & Vermilion*, for defendant in error.

Opinion by SIMPSON, C.: Skinner commenced an action in the district court of Sedgwick county on a promissory note for \$2,000, signed by J. C. Brunton and wife and Albert Law, and indorsed by James Goodacre—who did not write his name but made his mark—bearing interest at the rate of 12 per cent. per annum after maturity, the interest to be computed semi-annually, and to become principal after each semi-annual date; containing also these provisions:

“The sureties, guarantors and indorsers on this note severally agree and do hereby waive demand or presentation of this note for payment to the makers hereof, and waive protest and notice of protest; and do hereby grant to any holder of this note the right to grant extensions on this note to makers without notice to them or either of them, hereby ratifying such extensions and remaining bound on this note as if no extension had been obtained. All such extensions in the aggregate not to be longer than one year from the maturity of the note.”

This instrument was secured by a mortgage executed by Brunton and wife on real property situate in Sedgwick county, containing among other provisions one that the buildings on mortgaged premises should be insured, and in case of loss the insurance should be paid to the mortgagee, if mortgage should be due, or become a trust fund for payment if not due, or

---

Goodacre v. Skinner.

---

should be used in rebuilding. Brunton and wife and Law made default. Goodacre filed an answer, admitting he signed the note as claimed, but alleged there was due only the sum of \$2,000; that he signed the note as surety for Brunton; that no diligence had been used by the plaintiff in the collection of the note; that Brunton was permitted to remove property of the value of \$1,000 and five horses of the value of \$700 from the county of Sedgwick, after the plaintiff was notified that the said Brunton was about to remove said property, and this after the indebtedness had accrued, to wit, on the 1st day of August, 1887. He further alleged that the payment of said note was not demanded of Brunton or of the defendant Law within a reasonable time after the maturity of the same, and that this defendant was not notified of the default of the principals on said note, or of the protest of the same; that he is unskilled in business affairs, and was, prior to the commencement of this suit, wholly ignorant of any other form of a promissory note than the most simple form; that he is unable to read or write, and has to rely on others to explain to him the contents of written or printed instruments; that at the time of the execution of said note the said plaintiff was present, and the defendant relied upon the plaintiff to inform him of the contents of said instrument, and that the plaintiff wholly failed and neglected to explain or read to the defendant all parts of the note in addition to the usual short form of promissory notes; that the plaintiff did state to this defendant that it was a note for \$2,000, payable in 90 days, whereby this defendant was misled by plaintiff as to his obligation upon said note, and that all the clauses of said note in addition to the usual short form are void as against this defendant. This answer was verified and filed on the 19th day of August, 1887, this action being commenced on the 20th day of July of the same year. The plaintiff filed a reply to the answer of Goodacre that contained only a general denial. This was all of the pleadings.

The case was called for trial on the 29th day of May, 1888, after having been pending for a year, and the defendant, Good-

acre, demanded a jury to try the issues in said cause. The trial court refused to order a jury, to which ruling exceptions were saved. Goodacre, through his counsel, then asked leave of the court to amend his answer, by adding thereto after the word "suit," on line 13, these words: "Whereby said defendant has been prejudiced, and is damaged, and has been unable to proceed against the said Brunton to prevent him from removing his property out of the jurisdiction of this court, and disposing of the same for the purpose and with the intent and to the effect of cheating, hindering and delaying his creditors in the collection of their debts; that the said Brunton is now insolvent, and that nothing can be made off him by execution; and that if, at the time said note had become due, due diligence had been pursued in the collection of the said note, that it could have been made off of said Brunton." The court refused leave to amend the answer, and to this ruling exceptions were duly taken. Goodacre then filed a written motion for leave to file a supplemental answer, as follows:

"Now comes the defendant, John Goodacre, and asks leave of the court to file a supplementary answer in the said cause, alleging the following facts which have occurred since the filing of the original answer of this defendant in this case, to wit: That on, to wit, the 1st day of May, 1888, there was and had been a long time prior to the commencement of this suit a mill situated on the immediate premises described in plaintiff's petition, of the value of, to wit, \$3,000; that on said 1st day of May, 1888, the said mill was by fire totally destroyed; that the said defendants Law and Brunton have been in default in this action ever since the answer day therein, and that this defendant has frequently requested the said plaintiff, during and at each of the last two terms of said court before this one, to take judgment as and upon the default against said defendants Law and Brunton, and to foreclose their said mortgage upon the said property, to have the said property sold to satisfy the said debt, which request the said plaintiff has refused to grant; that by reason of the above premises, the said security on the said note, to wit, the said real property mentioned in plaintiff's petition has been greatly depreciated in value, and that by reason of the negligence of the said plaintiff in the

---

Goodacre v. Skinner.

---

prosecution of this case as against the said defendants Brunton and Law; that if the said mortgage had been foreclosed with due diligence, that the said property was amply sufficient to have satisfied the said note; that the said Brunton is now insolvent, and that at the time of the commencement of this action he was solvent; whereby the defendant prays judgment for costs."

The motion was overruled, and exceptions were noted.

"It is asked in open court by and between the parties to this suit that said application be duly verified, and the defendant now asks time to give them such notice as the court may deem sufficient, on the presentation of this motion to the court; to which plaintiff objects, and the court denies application to make further showing. Whereupon attorney for defendant, Mr. Bentley, interrogates Mr. Vermilion, attorney for plaintiff, as follows: 'Mr. Vermilion, I want to ask you if one of the grounds of your objection to the consideration of this motion is that you have not had sufficient notice of it?' A. 'That is one of them, and I object on all other grounds.' Defendant asks time to give plaintiff sufficient notice of this application, and asks to make a showing in court of the fact, in addition to the facts I have already given in here in an answer sworn to, that my client is unskilled and unable to read or write, also the fact that I was not aware of the fact that the mill had burned down until this morning; to which plaintiff objects, and the court denies the request, exception being duly noted by defendant. The court requires the parties to proceed to the trial of the case. Plaintiff in open court consents to take judgment for the amount due on indebtedness claimed in plaintiff's petition, \$2,000, and interest from the 20th day of January, 1887; and thereafter the plaintiff also produces his original note and mortgage."

Skinner was then called as a witness, and on being asked a question, the attorneys of Goodacre objected to any evidence until after a jury had been duly impaneled to try the cause. This objection was overruled, and excepted to. The examination of Skinner in chief and on cross-examination by the attorneys of Goodacre was then proceeded with, and at its conclusion the plaintiff rested. Goodacre was then sworn and offered as a witness for the defendant. The plaintiff's attorneys objected to the introduction of any evidence for the de-

fendant because there is no defense pleaded in the answer. This objection was sustained, and duly excepted to, and final judgment rendered for Skinner for \$2,329.60, and for the sale of the mortgaged premises. Goodacre brings the case here for review.

I. The principal error complained of is the refusal of the trial court to impanel a jury to try the cause, at the demand of Goodacre. If Goodacre's answer did not state a cause of defense, there was no issue for a jury to try. We think his original answer did not state a defense to the action. Goodacre signed the note on the back thereof at the time of its execution, and before its delivery to Skinner; and so far as the face of the note is concerned he was a guarantor, but he avers in his answer that really he was surety for Brunton; but as surety he waived demand, protest and notice of protest (if necessary), and extension of time to the makers, not exceeding one year. The note he signed as surety for Brunton was secured by a mortgage on real property belonging to Brunton; and under such conditions, if Brunton was removing and disposing of his personal property, and rendering himself unable to pay the note, the surety, and not Skinner, ought to have invoked the aid of the law. His alleged defense that he was unskilled in business affairs, and ignorant of any form of promissory note but the short form in common use, and that at the time of the execution of said note the plaintiff was present, etc., does not allege fraud on the part of the plaintiff. He admits the execution of the note, and that \$2,000 was due on it, and judgment for that amount, with interest, was rendered. If he was a surety, he was not entitled to demand protest and notice thereof. Neither does the delay in bringing suit release him, as has been decided recently by this court in *Ingels v. Sutliff*, 36 Kas. 444. There being no defense pleaded in the original answer, the trial court did not err in refusing a jury trial.

II. The proposed amendment to the answer came very late, and did not create an issue, if allowed, and no error follows the action of the court in refusing to allow it. The applica-



---

Linn Co. Bank v. Hopkins.

---

tion to file a supplemental answer after a case is called for trial requires a very strong showing to rebut an irresistible inference. Supplemental pleadings can only be allowed on notice, and as the issues made up might be subject to material change by the facts occurring after issue joined, the supplemental pleading ought to be offered within a reasonable time after the occurrence of the fact that makes it necessary. There is absolutely no legal showing in this record for the filing of a supplemental answer.

III. The last contention is, that the court improperly overruled the motion for a new trial on the ground of newly-discovered evidence. The affidavit of Goodacre, if uncontradicted, would not have been sufficient to have authorized a new trial, and as the facts alleged by him were all disproved in the affidavits filed against the motion, the court could not err in refusing to grant a new trial.

If as vigorous fight had been made before the cause was called for trial and the trial commenced as was made after these two things had happened, the record would have probably presented some other questions. We recommend an affirmation of the judgment.

By the Court: It is so ordered.

All the Justices concurring.

---

THE LINN COUNTY BANK V. A. T. HOPKINS.

*REPORTER'S NOTE.*

**HOMESTEAD**—*Extent of Right.* Under the homestead exemption laws of this state, the homestead must consist of one body of land. A person residing upon one 40-acre tract of land and owning a second upon which he does not reside, and which only corners with the first, cannot hold the second 40 exempt as a homestead.

*Error from Linn District Court.*

ACTION by the *Linn County Bank* against *Hopkins*, to recover upon three promissory notes. March 22, 1889, a motion

## Opinion of the Court.

to discharge plaintiff's attachment was granted, and it brings error. The opinion states the material facts.

*James D. Snoddy*, for plaintiff in error.

*J. V. Donaldson*, for defendant in error.

Opinion by GREEN, C.: The Linn County Bank sued A. T. Hopkins upon three promissory notes, and at the same time caused an attachment to be levied upon the northeast quarter of the southeast quarter and the southwest quarter of the northeast quarter of section 21, in township 19, of range 24 east. A motion was made to discharge the attachment, on the ground that the 80 acres was exempt from forced sale for the reason that it was a homestead. The motion was sustained. The question, as stated by counsel for defendant in error, is whether all of the real estate attached at the instance of the plaintiff was exempt as the homestead of the defendant. The decision of that question settles the controversy in this case. The two tracts of land "cornered" upon each other, as will appear from the following diagram:

T. 19, R. 24.

	"B" S.W. qr. of N.E. qr.	
Sec. 21.		"A" N.E. qr. of S.E. qr.

---

Linn County Bank v. Hopkins.

---

The defendant had occupied the tract marked "A" as a homestead, but his home had been burned. We think, however, the evidence upon the motion to discharge the attachment established the fact that he intended to rebuild it, and that this tract was clearly exempt. He had never resided upon the other subdivision. Does the constitution exempt two tracts of land as a homestead which corner? It has been settled by this court that a homestead must consist of only one tract of land. (*Randal v. Elder*, 12 Kas. 257, and authorities there cited.) The language of the constitution is, that "a homestead to the extent of 160 acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, shall be exempt from forced sale." etc. (Const. art. 15, § 9.) A homestead is defined to be a person's dwelling place, with that part of his landed property which is about and contiguous to it. Contiguous means touching sides, adjoining, adjacent. Two tracts of land touching only at one point are not contiguous. In the case of *Kresin v. Mau*, 15 Minn. 119, it was said: "Two tracts of land mutually touching only at a common corner—a mere point—cannot, according to any ordinary or authorized use of language, be spoken of as constituting one body or tract of land." The same construction has been placed upon acts of congress in relation to the entry of public lands. (1 Lester, Land Laws, Reg. and Dec., p. 360. See also *Hill v. Bacon*, 43 Ill. 477; *Aldrich v. Thurston*, 71 id. 324; *Thomp.*, Homestead Ex., §§ 120, 145, 147.)

The order of the district judge discharging the attachment levied upon the southwest quarter of the northeast quarter of section 21, in township 19, of range 24, should be reversed.

By the Court: It is so ordered.

All the Justices concurring.

THE SOUTHERN KANSAS RAILWAY COMPANY V. DAVID  
A. GORSUCH.

47	583
49	307
47	583
64	133

**VERDICT**—*Inconsistent Findings—New Trial.* The record in this case examined, and held, that the special findings of the jury are so inconsistent with each other and with the general verdict, and disclose such a want of intelligence and fairness, that the motion for a new trial should have been sustained by the trial court.

*Error from Coffey District Court.*

**ACTION** to recover damages for personal injuries. Judgment for plaintiff, *Gorsuch*, at the January term, 1889. The defendant *Railway Company* brings the case here. The opinion states the facts.

*Geo. R. Peck, A. A. Hurd, and J. G. Egan*, for plaintiff in error.

*E. B. Peyton, Redmond & Junkins, and C. F. Arthur*, for defendant in error.

Opinion by STRANG, C.: Action for damages in two counts, begun in the district court of Coffey county, May 2, 1888. In his first count the plaintiff below alleges that on the 1st day of September, 1887, he accompanied some stock which he shipped at Waverly, in Coffey county, for Kansas City, over the road of the plaintiff company, riding in the caboose of the freight train on a stock contract; that the train to which the caboose in which he was riding was attached was side-tracked at a station called "Gardner," and while standing on the said side-track another train ran in on the side-track behind the one on which he was riding, and struck the rear of the caboose in which he was riding so violently that it threw him from the seat upon which he was lying to the floor of the car, whereby he was greatly bruised, wounded, and hurt, to his damage in the sum of \$1,500. For his second cause of action the plaintiff below alleged, that on the 15th day of September, 1887, he again accompanied some stock shipped from Waverly

to Kansas City over the company's road, riding as before in the caboose attached to the stock train; that when they reached Argentine, during the night, they were required to get out of the caboose and get on top of the stock cars and ride into Kansas City; that while making said change and before he had got off of the caboose, and without giving him time to get off, and while on the steps of the caboose in the act of getting off, without any warning, the switch engine, in the act of coupling on to the caboose to run it back to a side-track, ran violently against the said caboose, throwing him off onto the ground, injuring his hands, arms, side, and back, and also injuring him internally, putting him to \$300 expense for doctors and medicine, and to his damage otherwise in the sum of \$4,000. The defendant company answered to each of said counts, first, a general denial; and, secondly, alleged that if the plaintiff was injured such injuries were the result of his own negligence. Plaintiff replied by a general denial. The case was tried January 24, 1889, by the court and a jury, resulting in a general verdict for the plaintiff in the sum of \$1,800. The jury also made special findings of fact. Motion for a new trial was argued and overruled. A case was made for this court, and brought here asking this court to review and reverse the judgment of the trial court, and send the case back for new trial.

Numerous errors are alleged in the petition of plaintiff in error, but only one or two are seriously argued. We will consider only the motion for a new trial, and, in connection with this, only the character of the general verdict and the findings of fact upon which it is based. The general verdict is for \$1,800. The findings show that \$50 of that amount was for inconvenience and suffering, resulting from the injury claimed to have been inflicted September 1st, as set out in the first count in the petition. Under the second count of the petition the sum of \$400 was allowed for permanent injury, resulting from the injury inflicted on the 15th of September, at Argentine. Four hundred and seventy-five dollars were allowed the plaintiff for future pain and suffering in connec-

---

Opinion of the Court.

---

tion with the same injury, and \$750 for loss of future ability to labor. The jury also allowed \$125 for medical expenses and treatment. The jury seem to have absolutely ignored the evidence in relation to the plaintiff's inability to labor from the date of his injury to the time of the trial, as they fail to give him anything for this, the real period of disability, as disclosed by the evidence. Nor do they accord him anything for pain and suffering during this time, the period during which he must have suffered most, and during which the uncontradicted evidence shows that he did suffer. An examination of this case shows that the jury, either through ignorance or design, decided this case with little regard to the evidence or rights of either party under the evidence. In cases where juries, whether designedly or as the result of ignorance, ignore the evidence or trifle with the rights of parties, trial courts should promptly set aside their verdicts, and thus remind them that they are sworn to try causes according to the law and the evidence, and not to render verdicts and make findings to suit their whims or desires. It is evident that the jury in this case did not intend to be fair, or else that they were too ignorant to understand and appreciate the evidence as produced and the law as given.

The following questions, and the answers to the same, fully illustrate the character of the jury that tried the case, and the manner of their treatment of the same:

Q. 28. "Is not the plaintiff at this time in a sound and healthy condition?" To this question the jury first answered: "The preponderance of the evidence in the case would indicate that he is." After they were sent back to answer questions that they had left unanswered, and to return more specific answers to some of the questions already answered, they returned with a new answer to this question 28, the answer this time being "No." This was a flat contradiction of their first answer, the jury being still bound to observe the preponderance of the evidence. The final answer to this question being against the preponderance of the evidence thereon as found by

the jury themselves, the trial court should have set aside the verdict and granted a new trial.

Q. 29. "Is not the plaintiff's complexion fresh and ruddy at the present time?" The first answer of the jury to this question was, "Moderately so," while in their second answer they say, "No."

Q. 31. "Is there any indication at the present time of any fracture of the plaintiff's ribs?" Answer: "Not from the evidence of the examining physicians." Their second answer to this question was, "No."

Q. 39. "On the morning of September 15, 1887, at Argentine, did not C. M. Stout, in alighting from the caboose, step upon his sound leg, and fall over to avoid an injury to his leg which had been broken theretofore?" The first answer to this question was, "No conclusive evidence that he did." The second answer was, "Yes."

Q. 55. "If you find in favor of plaintiff on the second count in his petition, say how much you will allow for future pain and suffering, if anything." To this the first answer was, "No evidence introduced to determine this point." In their second answer they say, "\$475."

Q. 57. "If you find in favor of the plaintiff in the second count of his petition, how much do you allow him for medical expenses and treatment?" The first answer to this question was as follows: "No evidence to determine an answer, but allowed in question 54." The second answer to this question was, "\$125." The amount thus found above \$50 was unsupported by any evidence. This was so clearly an arbitrary finding of the jury, that counsel for plaintiff below offer, in their brief in this court, to remit \$75 of the amount.

Q. 30. "Is not the plaintiff unusually well preserved, strong and vigorous for a man of his age?" To this question the jury gave the following evasive answer: "Not unusually so." And yet with such an answer to this question the jury allowed the plaintiff below \$400 for permanent injury; \$475 for future pain and suffering, and \$750 for future loss of

ability to labor; or \$1,625 damages based upon a condition of health that the worst they can say of it is, that the individual referred to is not unusually well-preserved, strong and vigorous for a man of his age. This will not do. Trial courts must hold juries to a better observance of their duties, or it will become necessary for this court to reverse their judgments and send the cases back for new trials.

There are many other glaring inconsistencies in the record before us, but we have quoted enough to show their character, and the want of intelligent consideration given the case by the jury that tried it. We think the court should have granted a new trial.

We recommend that the case be reversed, and remanded for a new trial.

By the Court: It is so ordered.

All the Justices concurring.

47	587
50	764
47	587
52	608

## MARIA BRADFORD V. THE CENTRAL KANSAS LOAN AND TRUST COMPANY.

1. **DEATH OF PARTY—Revivor of Action.** The statute provides that an order to revive an action upon the death of either the plaintiff or defendant cannot be made after the expiration of one year without the consent of the opposite party.
2. **HOMESTEAD—Abandonment—Finding Sustained.** The evidence in the case examined, and held to be sufficient to sustain the finding of the trial court, that the land in controversy had been abandoned by both the husband and the wife as a homestead prior to the giving of the mortgage thereon executed by the husband alone.

*Error from Graham District Court.*

THE opinion contains a sufficient statement of the facts.

*Z. C. Tritt*, and *G. W. Jones*, for plaintiff in error.

*H. G. Laing*, for defendant in error.



The opinion of the court was delivered by

HORTON, C. J.: On the first day of April, 1887, Clay Bradford, the husband of Maria Bradford, the plaintiff, was the owner of the southeast quarter of section 19, in township 7 south, range 20 west, in Graham county, in this state. Upon that day Clay Bradford executed and delivered to the Central Kansas Loan and Trust Company, of Russell, Kansas, a mortgage on the land for \$600. This mortgage was filed for record in the office of the register of deeds for Graham county on the 5th day of April, 1887. Maria Bradford, the wife of Clay Bradford, did not sign the mortgage, and on the 29th day of August, 1887, brought her action against the Central Kansas Loan and Trust Company and Clay Bradford to have the mortgage declared null and void, upon the ground that the land at the date thereof was occupied as a residence by the family of Clay Bradford, and that the property had never been mortgaged with the joint consent of husband and wife. Subsequently, the loan and trust company filed its answer, denying that Clay or Maria Bradford, at the date of the mortgage, occupied the land as a residence, and also denying that at such date the land was the homestead of Clay Bradford or his family. Trial had before the court without a jury. The court made a general finding in favor of the loan and trust company, and rendered a judgment for costs against the plaintiff, Maria Bradford. She excepted, and brings the case here.

After the petition in error was filed in this court, on June 18, 1889, Mrs. Bradford died. After her death, her mother, Mrs. Nancy Dawson, was appointed administratrix. On the 18th day of March, 1891, Mrs. Dawson was removed as administratrix, and George F. Clark was appointed administrator in her place. At the late December session of this court, application was made to revive the proceeding brought by plaintiff in error in the name of George F. Clark, as administrator. It is not shown by any affidavit, or otherwise, when Mrs. Bradford died. Therefore, it does not appear affirmatively that the motion to revive has been made within a year,

## Opinion of the Court.

as required by §§ 433 and 434 of the civil code. The defendant has not filed any consent for a revivor. The statute provides that an order to revive an action upon the death of either the plaintiff or defendant cannot be made after the expiration of one year, without the consent of the opposite party. (*Angell v. Martin*, 24 Kas. 334; *Railroad Co. v. Andrews*, 34 id. 563; *Mawhinney v. Doane*, 40 id. 681; *Tibbetts v. Deck*, 41 id. 492.) Under the statute and the decisions of this court, upon the showing made there can be no revivor; and therefore the proceeding in error must be dismissed. (Gen. Stat. of 1889, §§ 4530, 4531; *Green v. McMurtry*, 20 Kas. 189; *Scroggs v. Tutt*, 23 id. 181; *Halsey v. Van Vliet*, 27 id. 474; *Myers v. Kothman*, 29 id. 19; *Tefft v. Citizens' Bank*, 36 id. 457.)

We have fully examined the record, however, and if the motion to revive were in time, we do not perceive any sufficient ground upon which to rest the reversal of the judgment of the trial court. There was evidence before the court below tending to prove that Clay Bradford made a homestead entry upon the land described in the mortgage in April, 1879; that he occupied the land with his wife as a residence from 1879 to some time in 1882; that he proved up on his land in 1884 or 1885; that Mrs. Bradford left Graham county in June, 1883, going to Nebraska; that she remained there one year and then went to Wichita, in this state; that after being at Wichita a year, she went to Kingman; that she was at Kingman until her return to Graham county in 1886; that after she left Graham county, in June, 1883, she did not cohabit with her husband any more; that when she returned to Graham county in 1886 she had three children—two of them were illegitimate—and soon after was pregnant again by some person other than her husband; that Clay Bradford left his homestead in 1882 and went to Ellis, in this state; that his wife, Maria Bradford, did not attempt to occupy the land in controversy after 1883 until in August, 1887, after the date of the mortgage, when she put in the house a bed and stove; that the house upon the land, from the 1st of March, 1887, until late in April of that year, was used as a granary; that after-

ward, for about three months, it was used for a school; that on the 3d day of May, 1887, Clay Bradford leased the property to Hiram Travis and John Neal; that there was not anything in the house from March, 1887, to April of that year but grain, and that during the last of April a district school was opened in the house. It further appears from the evidence, that in November, 1887, Clay and Maria Bradford conveyed by deed the land to W. R. Hill or J. P. Pomeroy for \$300. Whether this deed was a warranty or a quitclaim we cannot ascertain.

The court made a general finding for the defendant below, and therefore must have found, in order to render the judgment which it did, that both Clay Bradford and his wife, Maria Bradford, abandoned the land in dispute as a homestead prior to the 1st day of April, 1887. While the evidence is conflicting, we cannot say that there is no evidence whatever to support the finding. The conduct of Mrs. Bradford after she left her husband indicates clearly that she had no intention of returning to her husband or to the land in Graham county until she heard of the execution of the mortgage. Some of the evidence tends to show that Clay Bradford had not wholly abandoned the land as his homestead; but he did not live upon it after 1882, and we cannot say, as against the finding of the trial court, that there is not sufficient evidence tending to show his abandonment of the land as a homestead. Under the constitution, there must be occupancy as a residence by some one of the family of the owner to constitute a homestead. (*Farlin v. Sook*, 26 Kas. 397; *Koons v. Rittenhause*, 28 id. 359.)

The judgment of the district court will be affirmed.

All the Justices concurring.

THE WATKINS NATIONAL BANK V. J. G. SANDS *et al.*

1. **ASSIGNMENT** — *Mortgages* — *Preference of Creditors*. Where a deed of assignment and certain mortgages were in contemplation at the same time, and the preparation of all commenced and proceeded together, and all were executed and completed substantially at the same time, the preparation and execution of all must be treated as a simultaneous, continuous and single act, and no preference can be rightfully claimed under the mortgages. (*Hardware Co. v. Implement Co.*, ante, p. 423, followed.)
2. ——— *Not Defeated* — *Good Faith*. In the deed of assignment the conveyance was made in general terms descriptive of all the property of the debtor not exempt by law, and it also contained a provision for the *pro rata* distribution of the proceeds among all the creditors; and it further provided that the conveyance was made subject to the mortgages executed contemporaneously with the deed of assignment. *Held*, That the assignment, having been made in good faith, and in terms so as to convey all the property of the assignor for the benefit of all his creditors, the reference to the mortgages, although inoperative and void, is not of itself sufficient to defeat the assignment.
3. **ATTACHMENT** — *Discharge*. The testimony examined, and found to be sufficient to sustain the ruling of the court in vacating and discharging an attachment.

*Error from Douglas District Court.*

ACTION by the *Bank* against *Sands* and another, on a promissory note. From an order, at the May term, 1889, discharging plaintiff's attachment, it brings error. The opinion states the facts.

*W. J. Patterson*, for plaintiff in error.

*B. J. Horton*, for defendants in error.

The opinion of the court was delivered by

JOHNSTON, J.: The Watkins National Bank brought an action against J. G. Sands and C. W. Cherry to recover the sum of \$700 upon a promissory note, together with the interest thereon. The plaintiff alleged that Sands had sold, conveyed and disposed of his property, and was about to sell,

47 591  
47 597  
48 105

47 591  
51 277

47 591  
56 441

47 591  
57 309

47 591  
58 412

convey and dispose of the same with the fraudulent intent to cheat, defraud, hinder and delay his creditors; and upon an affidavit setting forth these grounds an attachment was granted. Subsequently, a motion was made by Sands to dissolve the attachment, and it was alleged that the grounds set forth in the attachment affidavit were untrue. A like motion was made by Richard S. Horton, who stated that at the time the attachment was issued he was the assignee of the defendant J. G. Sands, under a deed of assignment executed and delivered to him. Considerable testimony was submitted upon the application, and the court, after hearing the same, vacated and discharged the attachment, and ordered that the property which had been attached should be delivered to the assignee under the general assignment made by Sands on May 14, 1889. A reversal of that order is sought by this proceeding.

It appears from the testimony that on May 13, 1889, Sands was in an insolvent condition, and determined to make a general assignment for the benefit of his creditors; and on that day he procured a form of assignment to be made, but no assignee was named therein, and it was not executed or acknowledged until the following day. On the 13th, he also prepared and signed certain notes and mortgages, which, however, were not delivered until after the assignment had been perfected. One was a note for \$1,000, executed to C. W. Brown, his father-in-law, who resided in New Hampshire, and which was secured by a mortgage on real estate. Another was a note for \$416.48, given in favor of the First National Bank of Fredonia, of which his son-in-law was an officer and stockholder; and this he secured by a mortgage on the same real estate. There was still another note, for \$1,029.36, made in favor of his son-in-law, M. Abernathy, of Fredonia, and it was secured by a chattel mortgage upon his stock of goods. None of the parties to whom the notes and mortgages were given were present to receive them, nor had they any knowledge of their execution until after the assignment was made. The notes were forwarded through the mails to these parties, at distant towns, on May 14, 1889, and the mortgages

## Opinion of the Court.

were carried to the office of the register of deeds by R. S. Horton, after he had agreed to accept the position of assignee, and only a few minutes preceding the execution of the deed of assignment. Sands testifies that the deed of assignment was signed and acknowledged by him only about 15 minutes to half an hour after the mortgages had been placed in the hands of the assignee for conveyance to the register of deeds. The deed of assignment undertakes to convey to R. S. Horton, the assignee, all the property of Sands, real and personal, of every nature and description, except such as is exempt under the laws of the state of Kansas. The instrument contained a clause reciting that the assignment was made subject to the three mortgages that have been mentioned.

An examination of the testimony leads us to the conclusion necessarily reached by the district court, that Sands acted throughout in good faith and without fraudulent purpose. The debts which the mortgages were given to secure appear to be actual and *bona fide*, and the debtor's purpose seems to have been to devote all his property to the payment of his debts. If the assignment and mortgages were made in good faith, and without actual intent to defraud or defeat creditors, the fact that they were informal or irregular is not alone sufficient to sustain an attachment. While the debts are to be treated as *bona fide*, and the conveyances as having been made in good faith, it does not follow that the mortgages are to be upheld nor that the mortgagees are to be treated as preferred creditors. It is true, and has frequently been held, that a debtor in failing circumstances may prefer creditors, so long as he retains the control and disposition of his property, by the payment of money or property, or by securing such creditors, providing the payment is made or the security given in good faith. Such honest preference may be given at any time prior to the making of an assignment. If, however, the mortgages are prepared and executed in connection with the deed of assignment, and substantially at the same time, then all should be treated as a single and continuous transaction, and nothing could be taken under

1. Assignment—  
mortgages—  
preference of  
creditors.

---

Watkins National Bank v. Sands.

---

the mortgages. (*Hardware Co. v. Implement Co.*, ante, p. 423.) The facts in this case bring it fairly within the cited case. There was a voluntary general assignment by deed containing general terms descriptive of all the property of the debtor not exempt by law; and it also contained a provision for the *pro rata* distribution of the proceeds among all the creditors. All the papers were prepared on May 13, including the notes, mortgages, and form of assignment. The notes were not sent to the payees, nor were the mortgages delivered to them, nor for record, on that day, nor until about the time the assignment was consummated. Sands kept them in his possession after the skeleton deed of assignment was prepared, and until the 14th, "thinking," he said, "it was just possible, even at that late date, that I might change my mind about this assignment." On the 14th, and while he held the prepared mortgages and deeds of assignment in his possession, he arranged with Horton to act as assignee, and the instrument of assignment was then completed. After Horton had agreed to act as assignee, Sands placed the mortgages in the hands of the assignee, who carried them to the office of the register of deeds. The record discloses that one of the real-estate mortgages was filed for record at 11 o'clock A. M. of that day, and the other two mortgages at five minutes past 11 o'clock of the same day; while the deed of assignment was presented for record at 11:25 o'clock A. M. of that day. Sands admitted in his testimony that the deed of assignment was executed and acknowledged by him between 15 minutes and half an hour after the mortgages had been given to Horton to carry to the office of the register of deeds. Horton, however, was not the agent of the mortgagees, nor were there any representatives of theirs present to accept the instruments, and they cannot be said to have been delivered to anyone at the time of the assignment. In fact, they had no knowledge of their execution until some time after the assignment had been made and the property delivered to the custody of the assignee. It thus appears that all of the conveyances were in contemplation at the same time, the preparation of all commenced and proceeded

## Opinion of the Court.

together, and, practically, all were executed and completed at the same time. Following the former decision, the preparation and execution of all the instruments must be treated as a simultaneous, continuous and single act; and hence no preference can be rightfully claimed under the mortgages.

The fact that the assignor stated in the deed that it was made subject to the mortgages does not necessarily avoid the conveyance. If the assignor had reserved something which purported to have been conveyed to himself, or if the assignment was otherwise fraudulently made, it might vitiate the whole. The assignment, however, having been made in good faith, and in terms so as to convey all the property of the assignor for the benefit of all his creditors, the reference to the mortgages is of itself insufficient we

2. Not defeated —  
good faith.

think to defeat the assignment. In effect, it is a direction to the assignor as to the manner of distributing the assets of the estate. Such a direction or provision is inoperative, as the assignee is controlled by the statute, and not by the wish or direction of the assignor. The statute provides that "every voluntary assignment of lands, tenements, goods, chattels, effects, and credits, made by a debtor to any person in trust for his creditors, shall be for the benefit of all the creditors of the assignor, in proportion to their respective claims; and every such assignment shall be proved or acknowledged, and certified and recorded in the same manner as is prescribed by law in cases wherein real estate is conveyed." (Gen. Stat. of 1889, ¶ 342.) In this provision no preferences are allowed, but the assignee is required to distribute the proceeds of the estate among all the creditors of the assignor, in proportion to their respective claims. The provision of statute quoted appears to have been copied from the statute of Missouri, which has been in effect in that state since 1864, and the courts in construing the statute have held that any direction as to the distribution of proceeds or attempted preference will not avoid the assignment, but that the assets of the estate must inure to the benefit of all the creditors. (*Shapleigh v. Baird*, 26 Mo. 326; *Crow v. Beardsley*, 68 id. 435; *Martin v. Hausman*, 14 Fed.



## National Bank v. Sands.

Rep. 160; *Krebs v. Ewing*, 22 id. 693. See, also, *Henderson v. Pierce*, 9 N. E. Rep. 449; *Burrill, Assignm.*, § 352.) The provision incorporated in the deed with reference to the mortgages, by which the assignor prescribed the rule of distribution, and which, if carried out, would operate as a preference, does not conform with the statute, and hence it cannot stand. It may be said of our law, as was said of the Missouri statute, "Nothing in the section indicates that an assignment preferring a portion of the creditors should be void, but the most reasonable construction of the section is that the assignment should stand and inure to the benefit of all." (*Crow v. Beardsley*, *supra*.) The mortgagees therefore obtain no benefit by virtue of this provision which was incorporated in this deed of assignment, but they may come in with the other *bona fide* creditors and receive payment from the assignee "in proportion to their respective claims." The facts of the case, however, not being sufficient to sustain an attachment, the order of the district court dissolving the same must be affirmed.

All the Justices concurring.

47	596
50	392

47	596
51	277

THE DOUGLAS COUNTY NATIONAL BANK V. JAMES G. SANDS.—THE NATIONAL BANK OF LAWRENCE V. SAME.—GEORGE A. BANKS V. SAME.

1. CASE, *Followed*. The case of *Watkins National Bank v. Sands*, just decided, referred to and followed.
2. ATTACHMENT—*Dissolution*. The evidence in the present cases examined, and *held*, that under such evidence the decision of the district court discharging the attachments must be affirmed.

*Error from Douglas District Court.*

THREE cases brought to this court to review in each the order and judgment of the district court discharging the at-

tachment therein, at the May term, 1889. The facts appear in the opinion.

*D. S. Alford*, for plaintiff in error the Douglas County National Bank; *S. O. Thacher*, for plaintiffs in error the National Bank of Lawrence and Geo. A. Banks.

*B. J. Horton*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: The judgment of the court below in each of these three cases will be affirmed, upon the authority of the case of the *Watkins National Bank v. James G. Sands*, just decided. See, also, the following authorities: *Case v. Ingersoll*, 7 Kas. 367; *Cuendet v. Lahmer*, 16 id. 527; *Harris v. Cappell*, 28 id. 117; *Kelsey v. Harrison*, 29 id. 143; *Tootle v. Coldwell*, 30 id. 125; *Bailey v. Manufacturing Co.*, 32 id. 73; *McPike v. Atwell*, 34 id. 142; *Hershfield v. Lowenthal*, 35 id. 407; *Hosea v. McClure*, 42 id. 403; *Allen v. Puget*, 42 id. 672; *Cooper v. Clark*, 44 id. 358; *Furniture Co. v. Armstrong*, 46 id. 270. See, also, 1 Wade, Att., § 96. The first of the above cases now under consideration, the one of the Douglas County National Bank, cannot be distinguished from the Watkins National Bank case, above cited and followed. The second case, that of the National Bank of Lawrence, can scarcely be distinguished from the Watkins National Bank case, there being no important differences between them. As to the other case, that of George A. Banks, there is a difference in the facts which it is claimed is of importance. Banks's action was commenced on May 15, 1889, on promissory notes dated in 1882, and it is claimed that after that time, and in August, 1887, Sands gave to his wife \$1,300 in cash for a consideration of about \$800, and therefore that \$500 of the amount was a pure gift, and that Sands was insolvent at the time, and therefore that the transaction was a fraud upon Sands's creditors. Of course it is a fraud against creditors for an insolvent person to give away his property; but this claim, however, of the plaintiff in error, Banks, is not sufficiently shown by the evidence, and

---

National Bank v. Sands.

---

the burden of proof was upon the plaintiff, Banks; and the findings of the court below were against Banks and in favor of Sands. The facts with regard to this matter seem to be about as follows: This money, \$1,300, was obtained by Mrs. Sands on account of Quantrell raid losses. The Quantrell raid occurred on August 21, 1863, at which time a large amount of property belonging to Sands was destroyed by Quantrell's band. Sands promised that whatever might afterward be received on account of his losses at this raid should be given to his wife. When this promise was first made is not, however, shown. In 1875, an act of the legislature was passed appointing a commission to examine and certify the amount of the losses which occurred by reason of this as well as of other raids of guerrillas and marauders during the years from 1861 to 1865. We would infer that under this statute a claim for Sands's losses was made out and presented in Sands's wife's name, and examined and approved by the commission. In 1887, an act of the legislature was passed providing for the assumption and payment by the state of Kansas of all such claims; and in August, 1887, Mrs. Sands drew the amount allowed to her, which was about \$1,300. It does not appear that Sands ever had any of this money in his possession; nor does it sufficiently appear that Sands was insolvent at that time, or at any time prior thereto; and, as before stated, the findings and judgment of the court below are against the plaintiff, Banks. Also, it would seem that Sands at the time owed to his wife about \$800 of the amount, and the remainder of the amount, to wit, \$500, was afterward used in making improvements upon their homestead. Sands was at that time and had been for years openly doing a harness and saddlery business at Lawrence, and he continued in such business, and his credit was then and afterward "first class;" and he continued in such business for nearly two years afterward, to wit, until about May 13, 1889, when he executed the mortgages and assignment involved in this controversy. The Banks suit, as before stated, was commenced on May 15, 1889, when an order of attachment was issued

therein and levied upon a portion of Sands's stock of goods, both at Lawrence and Eudora. It would hardly seem that the foregoing facts could be held sufficient to sustain the foregoing attachment. The court below found and held that they were not, and we cannot say that the decision is erroneous.

We think the decision in this case and in the other Sands cases will do ample justice. Under it neither the mortgagees nor the attaching creditors will get advantages or preferences over the other creditors, but all of Sands's property which is not exempt from judicial process will be used for the benefit of all his creditors in proportion to their respective claims. This is equity, while to give preferences or advantages to either the mortgagees or the attaching creditors would not be equity.

The order and judgment of the district court in the three cases now under consideration will therefore be affirmed.

All the Justices concurring.

---

CHARLES A. PRAY *et al.* v. ISABELLA N. JENKINS *et al.*

47 589  
65 485

**EJECTMENT—Mortgage—Foreclosure—Forgery—Evidence.** In an action of ejectment brought against the grantee of a purchaser at a judicial sale made in an action of foreclosure, it is competent for the plaintiffs in the ejectment action to show that the mortgage was a forgery, and that the persons purporting to have executed the same were not served by process in the foreclosure suit.

*Error from Osage District Court.*

**EJECTMENT.** Judgment for plaintiffs, *Jenkins* and another, at the July term, 1888. The defendants, *Pray* and wife, bring error. The opinion states the facts.

*Jetmore & Jetmore*, for plaintiffs in error.

*Vance & Campbell*, for defendants in error.

Opinion by SIMPSON, C.: This is an action in ejectment, brought in the Osage county district court by Isabella N. Jenkins and Johanna Van Dorp against Charles A. Pray and Alice Pray, to recover a quarter-section of land. The plaintiffs below show title from the government through mesne conveyances. Pray and wife claim title through a sheriff's deed of date January 28, 1880, made by virtue of an order of sale issued under a foreclosure decree, wherein E. A. Johnson was plaintiff, and Isabella N. Jenkins and William Henry Jenkins, her husband, and Johanna Van Houten, now Van Dorp, were defendants. It appears that the father of these ladies delivered them a deed to said land in May, 1877. This deed was executed on the 9th day of December, 1874, by the grandfather and grandmother (they being the owners) of the defendants in error. It was placed upon record on the 15th day of June, 1877, and at the same time a mortgage, purporting to have been executed by Jenkins and wife and Johanna Van Houten to one E. A. Johnson, to recover the payment of \$400, with interest, was filed for record. Payment of interest being in default, an action of foreclosure was commenced by Johnson, that resulted in a judgment and an order of sale of the mortgaged property. It was sold to Johnson, the sale was confirmed, and a deed made by the sheriff to Johnson, who, on December 21, 1880, conveyed the same by warranty deed to these plaintiffs in error, who, on the 1st day of March, 1881, went into the actual possession of the land, and have held the same ever since, and have made lasting and valuable improvements on the same and occupied it as their homestead.

The plaintiffs below claim that the mortgage was never executed by them, or either of them, and that the same is a forgery and is fraudulent and void, and that they had no knowledge, notice or information of the existence of said mortgage until just prior to the commencement of this action; that the court rendering the decree of foreclosure had no jurisdiction of their persons, neither Isabella N. Jenkins nor Johanna Van Dorp ever having been served with process in said

---

Opinion of the Court.

---

action, nor had any knowledge or notice of the pendency of such action until just prior to the commencement of this action. The trial court made the following special findings of fact and conclusions of law, to wit:

“FINDINGS OF FACT.

“On considering the evidence in this case, I find that on the 14th day of June, 1877, the plaintiffs were the owners in fee-simple of the land in controversy in this action, being the southeast quarter of section 10, township 14, range 17, in Osage county, Kansas; that on the 28th day of January, 1880, I. H. Smith, as sheriff of said Osage county, Kansas, executed and delivered to E. A. Johnson a deed, purporting to convey to said Johnson the interest of one of the plaintiffs, Johanna Van Houten, now Johanna Van Dorp, to said real estate; that it is upon this deed that the defendant Charles A. Pray bases his title to this real estate; that said sheriff's deed was based on a certain foreclosure proceeding had in the district court of Osage county, Kansas, the object of which proceeding was the foreclosure of a mortgage purporting to have been executed by plaintiffs, Johanna Van Dorp, then Johanna Van Houten, and Isabella N. Jenkins, under the name of Isabella N. Jenkins, and her husband, William Henry Jenkins. This mortgage purports to have been executed and acknowledged on the 14th of June, 1877, and to have been recorded on the 15th day of June, 1877, on which last-named day the deed for said land to said plaintiffs, which was executed on the 9th day of December, 1874, was also recorded.

“I find that in these foreclosure proceedings no valid service of summons was ever made upon either of the plaintiffs in this case, but that personal service was made upon William Henry Jenkins; that in said case judgment was first rendered against William Henry Jenkins and Isabella N. Jenkins, one of the plaintiffs in this case, with a decree of foreclosure of the mortgage as to them and an order of sale of their interest to said land; that afterwards judgment was rendered in said case against Johanna Van Houten, and a decree of foreclosure of said mortgage as to her and an order of sale as to her interest therein; that when said land was sold finally, it was sold under the last-named judgment, and only the interest of Johanna Van Houten therein was conveyed by the sheriff and conveyed on said sheriff's deed.

“I further find that the sheriff's deed was recorded on the

---

Pray v. Jenkins.

---

— day of —, in the year 1880, and afterward, on the 18th day of November, 1880, E. A. Johnson, grantee in said sheriff's deed, conveyed to said Charles A. Pray, by a warranty deed, the land in controversy, which last-named deed was recorded on the 21st of December, 1880, and that the consideration in said deed was \$925; that said Charles A. Pray, under the said deed, went into possession of said land about the 1st of March, 1881; and has ever since that time remained in exclusive possession of said land, and has made valuable and lasting improvements thereon.

"I further find that the plaintiff Isabella Jenkins became aware of the fact that she, together with her sister Johanna Van Houten, now Johanna Van Dorp, owned this real estate some time in May, 1877, at which time the deed for said land was delivered to her by her father, then living in Topeka, Kansas; that the plaintiff Johanna Van Dorp had no knowledge of her ownership or interest in said land until about two years ago.

"I further find that the mortgage purporting to have been executed by Isabella Jenkins and William Henry Jenkins, her husband, and Johanna Van Houten, to E. A. Johnson, on the 14th day of June, 1877, was not executed, signed or acknowledged by said Isabella Jenkins and Johanna Van Houten, now Van Dorp, at that time, or at any other time; that said mortgage was fraudulent and void as to them."

"CONCLUSIONS OF LAW.

"As conclusions of law from the facts found, I find that the plaintiffs are entitled to recover possession of the real estate in controversy in this action, and also to recover their costs."

I. The two controlling questions in this case are matters of fact, rather than of law. These are, was the mortgage executed by the parties charged with its execution? and was service of process made on Isabella N. Jenkins and Johanna Van Dorp in the foreclosure action? To except these questions from the operation of a familiar rule, the effort of counsel for the plaintiffs in error has been expended in the attempt to show that the decision below was against the evidence, but this much can be said with perfect truth: that there is evidence to support the finding, and we can with great propriety go further, and say that the weight of the evidence is apparently with the

---

Opinion of the Court.

---

proposition that no personal service of summons was ever made on Mrs. Jenkins and Miss Van Houten in the foreclosure action. The evidence that they never signed the mortgage, while not as strong and satisfactory as the want of service, is yet sufficiently strong to sustain the finding in that respect. Still it is not our province to determine its effect further than to insist on a fair compliance with the spirit of the rule requiring some evidence to support the finding.

II. It is insisted that this is a collateral attack on the judgment of foreclosure. With the finding supported by evidence that Mrs. Jenkins and Miss Van Houten were never served with process in that action, the case of *Mastin v. Gray*, 19 Kas. 458, seems to be conclusively against the contention of the plaintiffs in error. It is said in that case "that a judgment rendered without jurisdiction may be impeached in a collateral proceeding;" but it may be that according to the logic of the cited case this is a direct attack. In either event we do not think the court erred in this respect. The complaints made about the admission and exclusion of evidence become immaterial, because the controlling questions are want of personal service in the foreclosure suit, and the forgery of the mortgage, and if the evidence was excluded in the one instance and admitted in the other the result would not be changed.

We recommend an affirmance of the judgment.

By the Court: It is so ordered.

All the Justices concurring.



---

Clare v. Agerter.

---

## JAMES D. CLARE V. JOHN AGERTER.

**PROMISSORY NOTE — Rights of Surety — Chattel Mortgage — Lien.** The surety on a promissory note given for the purchase of personal property, to whom the property was delivered by the maker, has a right to retain the possession of said property against a chattel mortgagee, to whom the maker of said note executed a chattel mortgage while in temporary possession of the property by permission of the pledgee.

*Error from Brown District Court.*

**REPLEVIN.** Judgment for *Agerter*, May 17, 1889. The defendant, *Clare*, comes here. The facts appear in the opinion.

*James Falloon*, for plaintiff in error.

*C. W. Johnson*, and *S. F. Newlon*, for defendant in error.

Opinion by SIMPSON, C.: Agerter commenced this action in replevin against Clare, to recover the possession of one bay mare, one gray mare, and one set of double harness, which he claimed under and by virtue of a chattel mortgage executed by one J. C. Thomas. It appears that the property in controversy, on the 3d day of February, 1888, belonged to one J. H. Koger, who sold it on that day to J. C. Thomas for \$175; that Thomas paid by executing his note, with Clare as surety, and he agreed with his surety that the property should stand pledged to the surety until he (Thomas) paid the note; that subsequently, and about the 15th of December, 1888, Thomas delivered the property to Clare for him to hold possession of and keep until the note to Koger was paid; that on the 18th day of December, 1888, Clare permitted Thomas to have the temporary use of the property to go to a place six miles distant, with the distinct understanding that the property was to be immediately, on the return of Thomas, delivered to Clare; that while Thomas was thus temporarily in possession of the property, Agerter, on the night of December 19th, attached the same as the property of Thomas, and on the next day Thomas executed a chattel mortgage on this and

---

Opinion of the Court.

---

other property to secure to Agerter the payment of \$159.60. On the 21st of December Thomas redelivered the property to Clare, and on the 19th day of January, 1889, Agerter, the defendant in error, commenced this action. The case was tried at the May term, 1889, of the district court of Brown county, the general verdict of the jury being in favor of Agerter, but the special findings were to the effect that on the 3d day of February, 1888, the property in controversy belonged to J. H. Koger; that on that day Koger sold to Thomas, and received in payment a promissory note of Thomas for \$175, payable in one year, with Clare as surety; that there was an agreement between Thomas and Clare that the property should stand pledged for the payment of the note; that on or about the 17th day of December, and before Agerter recovered the mortgage from Thomas, the property was delivered by Thomas to Clare, so that Clare could keep possession, pay the balance due on the note, and when Thomas was able to repay Clare the property to be returned to Thomas; that on the 18th of December Clare permitted Thomas to have the temporary use of the property for the purpose of making a trip, and while said property was in the temporary possession of Thomas Agerter attached it, on the night of the 19th of December, and on the next day Thomas executed the note and chattel mortgage to Agerter. On the 21st of December Thomas returned the property to Clare, who has retained possession ever since, and when replevin was served Clare gave a delivery bond. When the general verdict and special findings were returned Agerter made a motion for a judgment in his favor, and Clare filed a motion for a judgment in his favor on the special findings. Clare's motion for a judgment on the special findings was overruled, and he brings the case here for review, claiming that the court erred in overruling his motion for a judgment in his favor on the special findings.

The trial court committed material error in overruling the motion of Clare for judgment on the special findings, as these control the general verdict. The facts found especially by the jury are to the effect that, at the time the chattel mortgage was

---

Tipton v. Warner.

---

executed to Agerter, both the right of possession and the actual possession of the chattels was in Clare. These chattels had been delivered to Clare in pursuance of a lawful agreement with Thomas days before the execution of the chattel mortgage to Agerter, and the temporary loan of them by Clare to Thomas did not disturb the legal title or right of possession in Clare.

We recommend that judgment be entered on the special findings in favor of Clare.

By the Court: It is so ordered.

All the Justices concurring.

---

## SAMUEL S. TIPTON V. ISAAC WARNER.

1. *LAND WARRANTS — Location — Demand — Limitation of Action.* In 1859, T. received from W. three land warrants, calling, in the aggregate, for 320 acres of land, and \$180 in cash, to be used by T. in locating land in Kansas, for the benefit of W., with the understanding that, if W. should not be satisfied with the selections of T., that T. would pay W. back his money and the value of the land warrants, at \$1 per acre, with interest at 10 per cent. T. used the warrants and money received from W. in locating land, but took the land in his own name. In September, 1885, W. elected to take the land, and demanded deeds for the same, and also demanded a settlement with T. *Held*, That the statute of limitations did not commence to run until such election and demand were made on T. by W., and that the action was not barred when the suit was commenced.
2. *PETITION — Amendment.* The petition in this case examined, and *held*, that the petition might have been amended on the trial to conform to the facts proven, and that this court will treat it as having been thus amended, and will not reverse the case because of a variance between the petition and the facts proven and the judgment rendered thereon.

*Error from Anderson District Court.*

SUIT by Warner against Tipton, to recover land. Judgment for plaintiff, at the adjourned March term, 1888. The defendant brings error. The opinion states the facts.

*W. A. Johnson*, for plaintiff in error.

Opinion by STRANG, C.: July 20, 1859, at Lawrence, Kas., Samuel S. Tipton received from Isaac Warner three land warrants of the value of \$320 and \$180 in money, to use in locating land in Kansas for the benefit of Isaac Warner, with the understanding between said Tipton and Warner that, if said Warner was not suited with the land selected by Tipton, Tipton should pay him his money back, including \$320 for the warrants, in one year, with interest at the rate of 10 per cent. Tipton located said warrants upon lands in Anderson and Coffey counties, Kansas, in his own name. He never deeded any of said lands to Warner, but on the 22d of March, 1880, he deeded 120 acres of the land to the defendant Catherine Mooney for \$600, and on the next day deeded 80 acres of said land to W. H. Reed for \$475, who subsequently conveyed the same to the defendant Amanda Stout. Tipton still held the balance of said land in his own name at the commencement of this suit, but afterward, on the 6th of March, 1886, he mortgaged said land to N. P. Garretson, one of the defendants, for the sum of \$1,000. Tipton never paid Warner any of the \$180, nor anything for said warrants. The cost of locating said land, and the taxes on the same prior to the commencement of this suit, amounting to \$846.52, were paid by Tipton, and none of said amount has been paid by Warner to Tipton. August 24, 1885, in response to a letter from Warner inquiring about the transaction, Tipton wrote as follows to Warner:

“Yours came to hand a few days since, and as I am very busy and thought to write you every day, but it rained to-day and stopped me from haying. I take this opportunity of saying that I entered three pieces of land and kept them as long as I could, for taxes were eating me up, and I was obliged to sell, but if you will come out here I think we can come to some understanding with regard thereto and get all right.”

In response to said letter Warner came to Kansas, called on Tipton, and demanded deeds to the land, which were re-

## Tipton v. Warner.

fused by Tipton. The defendant Tipton answered to the amended petition, and the case was dismissed as to the other defendants. The answer was, first, a general denial, and second, a plea of the statute of limitations. The case was tried by the court without a jury, the court making the following findings of fact:

"1. In 1859, and ever since, the plaintiff was and remains a resident of Illinois, and the defendant is and for many years has been a resident of Kansas.

"2. On the 24th of August, 1885, the defendant wrote, signed and mailed to the plaintiff the letter of that date set out in the petition, in response to one inquiring about said land warrants, land, and money. The plaintiff received said letter and thereupon responded thereto by going in person to Kansas, called upon defendant and made the election and demand stated in the third paragraph of the agreed facts.

"3. All of these lands until sold were wild, vacant and unoccupied, and that tract remaining unsold is still in that condition."

Upon said facts and the admissions contained in the agreed statement of facts, the court found the following conclusions of law:

"1. The lands so located by defendant became and were at the plaintiff's option the property, in equity, of the plaintiff. The legal title was held in trust by the defendant, who had a lien thereon for the taxes paid by him, and who is chargeable with the \$180 advanced in 1859, and the proceeds of the sales and mortgage of the lands, as set forth in the agreed statement.

"2. The \$180 should be applied upon the taxes first paid by defendant, and the balance of said taxes, with interest at 7 per cent., should be deducted from the money so received from the sale and mortgaging of said lands, with interest, and the remainder, to wit, the sum of \$2,204.69, should be recovered by the plaintiff from the defendant with costs.

"3. The plaintiff should also have judgment for the conveyance to him of the tract remaining unsold, subject to the \$1,000 mortgage thereon. Judgment will be entered accordingly."

Motion to set aside the findings of fact and conclusions of law and grant a new trial was overruled, and judgment entered as follows:

---

Opinion of the Court.

---

"4. It is therefore ordered and adjudged and decreed, that the said defendant Samuel S. Tipton, within 30 days from the rising of this court, execute and deliver to the said plaintiff, Isaac Warner, a good and sufficient deed, with covenants of general warranty, conveying the premises in the said petition described, to wit: The east half and the southwest quarter of the southwest quarter of section 15, township 20, of range 17, in Coffey county, Kansas, to the said Isaac Warner in fee-simple, subject to the mortgage of \$1,000 above described; and in default of the execution and delivery of such deed as aforesaid by the said defendant, it is ordered that this judgment and decree shall have the effect and operation of such conveyance, so as to vest the title to the said premises in the plaintiff in fee-simple.

"5. And it is further ordered, that the said plaintiff, Isaac Warner, recover against the said defendant Samuel Tipton the said sum of \$2,204.68, his damages in form aforesaid assessed, and also his costs in and about his action in this behalf expended, taxed at \$——, and in default thereof that execution issue therefor."

This judgment was excepted to, and the case is brought here for review. The first error complained of is the action of the court in overruling the objection of the defendant below to any evidence under the petition of the plaintiff, for the reason that it did not contain facts sufficient to constitute a cause of action. The contention of the counsel for the plaintiff in error in connection with this assignment is, that the case is an action for the recovery of money, and that the petition shows upon its face that the cause of action is barred by the statute of limitations. This court is of the opinion, however, that the statute did not commence to run until September, 1885, when Warner came to Kansas, and for the first time demanded of Tipton a settlement, and an accounting under his trust. Until Warner elected whether he would take the land selected by Tipton for him, or receive back his money and interest, Tipton was not in default, and therefore the statute would not commence to run until Warner made such election and demand, in September, 1885. This action was commenced in January, 1886, less than one year after the

election and demand of Warner were made, so that the statute had not run, and the cause of action was not barred when the suit was begun.

The second error complained of relates to the conclusions of law of the court, and the judgment entered thereon. The contention in connection with this point is, that the pleadings disclose an action for the recovery of money, and that the court in its conclusions of law, and its judgment thereon, treated the case as an action to declare a trust and enforce the execution thereof. The petition might have been treated as a claim for the recovery of money, and we think it would have stated a cause of action as such, but it also contains many of the elements of a petition in an action to declare a trust and for the enforcement of the same. And the evidence shows that Tipton received the land warrants and money from Warner to locate land for the benefit of Warner. The following receipt is conclusive upon this point:

"Received of Isaac Warner land warrants as follows: Number 45311, containing 80 acres, and one containing 120 acres, numbered 94746, and one containing 120 acres, number 21375, and \$180, to use in the location of land in Kansas territory for the use and benefit of said Isaac Warner; that, if said Isaac Warner is not suited with Tipton's choice of location, said Tipton agrees to pay said Warner 10 per cent. per annum at the end of one year, with principal.

"This July 20, 1859.

SAMUEL S. TIPTON."

This receipt is also made a part of the petition. The petition also alleges that in September, 1885, Warner called on Tipton, in Anderson county, Kansas, for the sole and express purpose of settling with him, Tipton, the matters in connection with and growing out of the land warrants and money Tipton had received from him, and that Warner then demanded deeds for the land located by Tipton with the warrants and money received by Tipton from him. The evidence supports this allegation of the petition. The petition is not, perhaps, as full and complete as it should be to constitute an action to declare and enforce a trust against Tipton, but as the evidence is sufficient to support such a cause of action, and also to sup-

## Hoffman v. Hill.

port the judgment of the court, and as the petition might have been amended to conform to the evidence, this court will not reverse the judgment of the court below, but will consider the petition as having been amended to conform to the facts proved and the judgment of the court. (Civil Code, § 139; *Railroad Co. v. Caldwell*, 8 Kas. 244; *Yandle v. Crane*, 13 id. 344; *Bailey v. Bayne*, 20 id. 657; *Gas Co. v. Schliefer*, 22 id. 470; *Grandstaff v. Brown*, 23 id. 178; *Hummer v. Lamphear*, 32 id. 475; *Organ Co. v. Lasley*, 40 id. 521.)

It is recommended that the judgment of the district court be affirmed.

By the Court: It is so ordered.

All the Justices concurring.

## M. HOFFMAN V. ANDREW HILL.

1. **HOMESTEAD—Alienation—Lien—Joint Consent.** Except for taxes, purchase-money, and improvements, no alienation of the homestead of a husband and wife can be effected, nor any lien or incumbrance placed thereon, except by the joint consent of the husband and wife.
2. **What Constitutes.** And it makes no difference that the homestead, or a part thereof, may be used for some other purpose than as a homestead, where the whole of it constitutes only one tract of land not exceeding in area the amount permitted to be exempted under the homestead exemption laws, and where the part claimed as not a part of the homestead has not been totally abandoned as a part thereof by making it, for instance, another person's homestead or a part thereof, or by using it or permitting it to be used in some other manner inconsistent with the homestead interests of the husband and wife.

*Error from Russell District Court.*

THE opinion states the facts.

*H. G. Laing*, for plaintiff in error.

*Harry L. Pestana*, for defendant in error.

47	611
48	442
47	611
58	219
47	611
60	4
47	611
68	532
47	611
80	82



The opinion of the court was delivered by

VALENTINE, J.: The only question involved in this case is, whether lot number 5, in block number 16, in the city of Bunker Hill, in Russell county, was and is exempt as a homestead from a certain attachment and judgment and order of sale. The attachment was levied upon the property on June 30, 1888. The judgment was rendered on October 8, 1888, and the property was sold on an order of sale issued on such judgment on January 26, 1889; and on March 2, 1889, Andrew Hill, who was the defendant below and the judgment debtor, and who is now the defendant in error, moved the court to set aside the sale, upon the ground "that at the time of the rendition of said judgment, said lot 5, block 16, was, and for a long time prior thereto had been and ever since has been, a part of the homestead of said defendant and his family, used and occupied as such, and exempt from seizure and sale by virtue of process issued on said judgment." The court sustained the motion, and the plaintiff, M. Hoffman, brought the case to this court for review.

As the court below found in favor of Hill, the party claiming the property as his homestead, and against Hoffman, the party claiming under the attachment, the judgment, the order of sale, and the sale, it will be proper for this court to construe the evidence introduced upon the motion to set aside the sale liberally, for the purpose of upholding the views of the court below; and construing the evidence in this manner, we think the facts of the case are substantially as follows: For several years prior to the levy of the aforesaid attachment, Hill was the owner of lots numbers 5 and 6, in block number 16, in the city of Bunker Hill. These lots adjoined each other and constituted only a single tract of land, and together contained only about one-eighth of an acre. Hill was the head of a family consisting of himself, his wife, and an adopted daughter. There was a building on lot number 6, the porch of which extended over the boundary line between the two lots and onto lot number 5, which building Hill and his family

---

Opinion of the Court.

---

occupied and used as a residence, and also as a hotel and boarding-house. There was also a building on lot number 5 which Hill and family used in connection with their residence, hotel, and boarding-house. There were also out-buildings partly on both lots. Hill and his family in fact used these two lots together as a homestead and for hotel and boarding-house purposes; and this they had done for several years prior to the levy of the aforesaid attachment, and they still occupy the same for such purposes. Hoffman claims that the property is not a homestead under the provisions of the homestead exemption laws, for several reasons; but none of them are tenable. He also claims that the question as to whether the property was a homestead or not had been previously determined by the court upon a motion to dissolve the attachment, and had therefore become *res adjudicata*. But the motion to dissolve the attachment was not based upon the ground that the property was a homestead, nor did it in any manner present any such ground; and it was not filed or prosecuted by Hill and wife, but by Hill alone. Mrs. Hill was not a party to the action, nor did she make any appearance in the case; and it does not appear that she ever consented to the attachment or the judgment or the order of sale or the sale. The motion to discharge the attachment was based upon the ground that the grounds for the attachment were not true.

We think the decision of the court below in this case must be affirmed. It has uniformly been held by this court, from the decision made in the case of *Morris v. Ward*, 5 Kas. 239, in 1869, down to the present time, that, except for taxes, purchase-money, and improvements, no alienation of the homestead of a husband and wife could be effected, nor any lien or incumbrance placed thereon, except by the joint consent of the husband and wife. And it follows from the decisions made by this and other courts of last resort that it makes no difference that the homestead or a part thereof may be used for some other purpose than as a homestead, where the whole of it constitutes only one tract of land not exceeding in area the amount permitted to be exempted under the homestead

---

C. K. & N. Ry. Co. v. Marshall.

---

exemption laws, and where the part claimed as not a part of the homestead has not been totally abandoned as a part thereof by making it, for instance, another person's homestead or a part thereof, or by using it or permitting it to be used in some other manner inconsistent with the homestead interests of the husband and wife. (Thomp., Homesteads and Ex., §120, and cases there cited; *Hogan v. Manners*, 23 Kas. 551; *Morrissey v. Donohue*, 32 id. 644; *Rush v. Gordon*, 38 id. 535; *Bebb v. Crowe*, 39 id. 342; *Lazell v. Lazell*, 8 Allen, 575; *Mercier v. Chace*, 11 id. 194; *In re Tertelling*, 2 Dill. 339.)

We do not think that it is necessary to discuss any of the other points presented by counsel. The judgment of the court below will be affirmed.

All the Justices concurring.

---

THE CHICAGO, KANSAS & NEBRASKA RAILWAY COMPANY V. J. F. MARSHALL, *as Justice of the Peace.*

**MANDAMUS to Justice**—*Approval of Appeal Bond.* Where an appeal bond is tendered to a justice of the peace without any justification by the sureties thereon, and the justice is unacquainted with them or with their qualifications and objects to their sufficiency, it is the duty of the party presenting the bond to satisfy the justice by affidavit or other proof of their qualifications; and when this is not done, and the bond is not approved, the justice will not be compelled by *mandamus* to approve the bond after the expiration of the time for appeal, although it then appears that the sureties first offered possessed the requisite statutory qualifications.

*Error from Morris District Court.*

PROCEEDING by the *Railway Company* against *Marshall*, a justice of the peace, to compel him to approve two appeal bonds. Judgment for defendant, at the November term, 1888. The plaintiff comes here. The facts are stated in the opinion.

*M. A. Low, and J. E. Dolman, for plaintiff in error.*

*P. L. Thurman, and J. K. Owens, for defendant in error.*

The opinion of the court was delivered by

JOHNSTON, J.: The plaintiff in error brought this proceeding in the district court of Morris county to compel the defendant, as justice of the peace, to approve two appeal bonds which were presented to him for approval by the railway company. It appears that on the 19th day of April, 1888, A. J. Blythe recovered a judgment against the plaintiff in error before J. F. Marshall, a justice of the peace of Morris county, and on the same day J. F. Kendall recovered a judgment against the plaintiff in error before the same justice of the peace. Within 10 days after the rendition of judgment, and on April 28, 1888, the railway company tendered to the justice of the peace an appeal bond in each case, which was sufficient in form and amount, and each was signed by two sureties who resided outside of Morris county but within the state of Kansas. On May 14, 1888, an alternative writ of *mandamus* was allowed by the district court, requiring the defendant in error to approve the bonds or show cause why it should not be done. The defendant in error filed a return, denying the sufficiency of the bonds, and upon a trial of this issue the peremptory writ of *mandamus* was denied.

The testimony shows that the sureties who signed the bonds did not justify, and that no proof of their qualifications was produced before the justice when the bonds were tendered to him for approval. The testimony taken at the trial further shows that the pecuniary condition of the sureties upon the bonds was sufficient to meet the requirements of the statute. The appeal bonds, however, were not accepted by the justice as sufficient, and the attorney who presented them admits that the justice was not satisfied with their sufficiency when they were left with him. Plaintiff in error contends that the only objections made to the sufficiency of the bonds were, first, that the sureties were non-residents of the county; and, second, that

they had failed to justify. The sureties are not required to be residents of the county, but they must be residents of the state. (Civil Code, § 724.) The sureties upon the bonds tendered in this case possessed the requisite statutory qualifications; that is, they were residents of the state and were worth double the sums to be secured, over and above all exemptions, debts, and liabilities. The first objection, therefore, standing alone, would not be good. As to the second objection, it was the duty of the justice to require the persons offered as sureties to make an affidavit of their qualifications. This is a directory provision, and the absence of such qualifications upon appeal bonds that were otherwise sufficient would not invalidate the bonds. (*Railroad Co. v. Wilder*, 17 Kas. 239; *Smith v. Town Co.*, 36 id. 758.) It is probably true, that if a justice accepts a bond and does not require an affidavit of qualifications when the bond is received, he cannot, after the time has expired in which the bond is required to be filed, complain or object to it by reason of the absence of such affidavit. In this case, however, the justice testifies that these were not the only objections to the sufficiency of the bonds. According to his testimony, he told the person presenting the bonds that they were insufficient, and that person admitted that they were not good. He says one reason why he did not approve the bonds was, that the parties did not reside in his county, and he did not know that they possessed the requisite pecuniary qualifications; and the other was, that no affidavit or proof of qualifications of sureties was tendered with the bonds. It was the duty of the person presenting the bonds to satisfy the justice as to the sufficiency of these sureties; but, according to the testimony of the justice, this was not done; nor was there any attempt made to show that they possessed the necessary qualifications, although objection was then made to their sufficiency. Instead of furnishing such proof, the justice was requested to procure sureties who were sufficient. Under the testimony of the defendant in error, the trial court was warranted in denying the application for *mandamus*. Its judgment will, therefore, be affirmed.

All the Justices concurring.

P. M. WOOD v. C. P. WOOD *et al.*

1. **JUSTICE OF THE PEACE**—*Jurisdiction—Objections Too Late.* In an action commenced and tried before a justice of the peace, then appealed and tried in the district court, it is too late to raise a question of jurisdiction in this court, based upon a construction of the pleadings different from that on which the case was tried in the courts below.
2. ——— *Taking Books to Jury-Room.* Whether the jury should be allowed to take to their room when they retire for consultation the account-books of a partnership, is a question resting largely in the discretion of the trial court, and to reverse a judgment for that reason it must affirmatively appear that such discretion has been abused.

*Error from Atchison District Court.*

SUIT on a promissory note. Judgment for defendants, C. P. Wood and another, at the January term, 1889. The plaintiff, P. M. Wood, brings error.

W. D. Webb, Grant W. Harrington, and A. F. Martin, for plaintiff in error.

B. F. Hudson, for defendants in error.

Opinion by SIMPSON, C.: P. M. Wood and C. P. Wood entered into a partnership in April, 1886, for the purpose of conducting a second-hand store in the city of Atchison, each of the partners contributing the sum of \$500 as capital. C. P. Wood, for the purpose of contributing his share of the capital, and for other purposes, borrowed the sum of \$800 from P. M. Wood, and for this sum executed his note, payable in one year, securing the same by mortgage on a house and lot in Atchison. When the note for \$800 became due, the partnership accounts for the year were settled, and it was found that there was due C. P. Wood a sum that reduced the note to \$209.50. For this amount C. P. Wood and his wife, Mary A. Wood, executed their note, due in one year, with interest at 10 per cent., and P. M. Wood released the mortgage. By agreement, on the 20th of April, 1887, the partnership was

---

Wood v. Wood.

---

continued for another year, but on the 4th day of October, 1887, they sold out their stock, notes, mortgages and business to Wm. Vance, each receiving therefor the sum of \$600. After said note for \$209.50 became due, P. M. Wood brought suit thereon before a justice of the peace, in the city of Atchison, filing a bill of particulars, alleging the execution of the note, and praying judgment for the amount of the note, with interest and costs. C. P. Wood and wife filed an answer, denying all the allegations of the bill of particulars, except that of the execution of the note. They also pleaded want of consideration; they pleaded fraud and misrepresentation on the part of the plaintiff in obtaining said note; and by way of counterclaim or set-off they alleged a partnership between the parties, and that there were profits enough due C. P. Wood to cover the amount due on the note. To this P. M. Wood pleaded settlement of the partnership account for the first year of the partnership business, and the execution of said note for balance due on an account stated.

The case was tried in justice's court, appealed to the district court and tried by a jury, resulting in a verdict and judgment for C. P. Wood for \$154.67 and costs. P. M. Wood brings the case here for review, claiming that there are errors appearing on the record for which the judgment below ought to be reversed.

It is said in the brief and oral argument of counsel for plaintiff in error, that the main question is, did the justice of the peace have any jurisdiction to hear and determine the matters contained in defendant's set-off and counterclaim? This question appears to be raised for the first time in this court. We do not find that either before the justice of the peace or in the district court any distinct objection to the jurisdiction of the justice to try the issues raised by the pleadings was ever made. Nor do we understand that the bill of particulars of the defendant in error filed in the justice's court called for what is technically known as an accounting. This was not the object of the action. The suit was brought on a promissory note. One of the defenses was that the maker and payee

---

Opinion of the Court.

---

were partners in business, and that there was due the maker from the payee on settlement a sum more than sufficient to pay the note. Another one of the defenses was that the plaintiff in error had taken property belonging to the firm of the value of \$200 or more, and had not accounted for it. The thought that the defenses prayed for an accounting seems not to have occurred to counsel for plaintiff in error until after judgment had been rendered against him in the district court. He replied to the defenses set up in the defendant's bill of particulars and made no attack upon them. It is too late to raise the question of jurisdiction now. (*Hodgin v. Barton*, 23 Kas. 740.)

Complaint is made that the partnership books were admitted in evidence, for the reason that "there was no pretense that the books contained any matter relative to the case except partnership accounts of the parties, and the jury could not take the place of a court of equity." We fail to find any such objection in the record. Counsel for plaintiff in error call our attention in their brief to pages 11 and 43, but no such objection is found at these pages. Objections are found in both pages to the introduction of the partnership books on the ground that they are "incompetent, irrelevant, and immaterial, no proper foundation laid for their introduction, and not sufficiently proven." This is a very different objection to that stated in the brief. It may be that the objection stated in the brief might be considered an attack on the jurisdiction of the court, on the theory that the defenses pleaded would call for an accounting. It was proven that the entries in the books were in the handwriting of the plaintiff in error, and these were surely admissible under any view that could be taken. We do not believe, under all the circumstances, that the ruling of the court below, as to the admission of the books, is material error. We fail to find any objection recorded to what counsel call the statement of the attorney for the defendant in error as to what the books contained. What he did do was to call the attention of the jury to certain items in an account about which cluster these contentions, but, as we state, there



---

Wood v. Wood.

---

are no objections noted. The trial court permitted the jury to take the account-books to the jury-room while considering their verdict. This is within the discretion of the trial court, (*Thompson v. McEwen*, 24 Kas. 757,) and there is no showing by the plaintiff in error, or no implication arising from the record, that this discretion was abused, while every presumption is that it was not.

Finally, it is claimed that the third, fifth and sixth paragraphs of the instructions are prejudicial errors. The concluding words of the third paragraph are "or that the defendant's share of the profits of the partnership business, after deducting all expenses of the partnership, were sufficient or more than sufficient to pay off and discharge said note." The partnership had been dissolved for some time before this action was commenced; a settlement had been made before this action was commenced, and the defendants in error claim that in the settlement made the plaintiff in error had not given credit to his partner for certain goods that he had taken out of the stock and appropriated to his own personal benefit, and this and other things pleaded would amount to more than sufficient to discharge the note. The plaintiff in error is still insisting that the defense was really a cross-action for an accounting. The fifth paragraph covers substantially the same ground, and so does the sixth. The jurisdictional question, as well as the contentions about the instructions, are the aftermath of a lawsuit.

We find no material error among the assignments, and recommend an affirmance of the judgment.

By the Court: It is so ordered.

All the Justices concurring.

W. P. FULTON v. THE STERLING LAND AND INVESTMENT COMPANY.

47 621  
56 149

AGREEMENT, CONSTRUED—*Building of College, not Ultra Vires.* The instrument sued on in this case construed, in the light of the whole record, to import an undertaking between the plaintiff and defendant. Also held, that, under the decisions of this court, the building of the college referred to in this case was not *ultra vires*.

*Error from Rice District Court.*

THE material facts are stated in the opinion. Judgment for the plaintiff *Company*, at the September term, 1888. The defendant, *Fulton*, comes here.

*A. M. Lasley*, for plaintiff in error.

*J. W. Brinckerhoff*, for defendant in error.

Opinion by STRANG, C.: This was an action brought upon the following instrument, which is made a part of the petition in the case, to recover from W. P. Fulton the sum of \$200, the amount of his subscription therein:

"We, the undersigned, agree to pay the sum set opposite our names as follows: One-third down, one-third in six months from date hereof, and one-third in 12 months from date hereof, and the said sums so subscribed is a donation to the Cooper Memorial College, of Sterling, Kas., and the said sum to be used in erecting the said college building. And it is agreed that the commencement and building of said college is to be considered and held as a full consideration for this subscription and our obligation to pay the same set opposite our names.

"And each subscriber is entitled to lots to the amount of their subscription in the investment company's addition.

J. H. Ricksecker.....	\$750 00	Skiles & Wirshing.....	\$300 00
H. Irish.....	750 00	W. L. Brown.....	200 00
J. C. Turner.....	750 00	W. H. Page.....	300 00
C. K. Beckett.....	750 00	J. C. Johnson.....	150 00
J. Hoops.....	750 00	H. W. Maxwell.....	200 00
J. S. Smith.....	750 00	T. A. Dillay.....	200 00
W. M. Quigley.....	200 00	C. B. Donaldson.....	100 00
Truehart & Logan.....	800 00	McMurphy & Hughes....	200 00
R. J. Shay.....	200 00	W. P. Fulton.....	200 00

## Fulton v. Land Co.

J. W. Goodson.....	\$300 00	Chas. Mann.....	\$150 00
A. G. Landis.....	300 00	J. T. Gaskell.....	150 00
J. M. English.....	800 00	R. F. Bond.....	200 00
W. M. Lamb.....	150 00	H. Swartz.....	150 00
M. T. Williams.....	200 00	J. O. Stow.....	500 00
D. Sturgeon.....	200 00	R. Arnold.....	300 00
Hodge & Evans.....	200 00	W. Q. Elliott.....	750 00

"To be paid only when actually needed to prosecute the work."

The defendant below filed a demurrer to the petition, which was overruled. He then answered, and the case went to trial before the court without a jury. The court found in favor of the plaintiff below. Motion for a new trial was filed and overruled, and a case made and brought to this court for review.

The first error assigned is the action of the court in overruling the demurrer to the petition. The petition alleges the incorporation of the plaintiff under the laws of Kansas, recites the fact that, in 1886, the people of Sterling, Rice county, Kansas, were desirous of securing the location and erection of a college at their city, to be called the Cooper Memorial College, of Sterling, Kas.; that for the purpose of raising money to aid in the construction of said college, the instrument in writing, copied above, was created and the subscriptions therein contained were made; that at the time such subscriptions were made it was understood by the subscribers, including the defendant, Fulton, that the plaintiff, the Sterling Land and Investment Company, was to erect the college, and that said subscriptions were to be collected by said investment company and by it used in the construction of said college; that said subscription list was handed over to said company, and the subscriptions therein, except that of Fulton and one other, were paid to said company; that said company, relying upon said subscriptions to, in part, compensate them therefor, erected said college and turned it over to the trustees of the Cooper Memorial College; that the company tendered Fulton lots in its addition to the full value of his subscription, which he neglected and refused to take; and that he refused to pay the amount of his subscription, or any part thereof.

---

Opinion of the Court.

---

We think the petition states a cause of action, and the demurrer was properly overruled. Counsel for Fulton claims in his brief that there was no contract between Fulton and the plaintiff below. We think there was. The instrument signed by Fulton must be construed in the light of all that occurred in connection with the subject to which it relates. An examination of the record shows that, in 1886, the people of the city of Sterling, like the people of most other cities of Kansas, were actively engaged in an endeavor to improve their city. To promote such endeavor, they determined to secure the erection of a building therefor and the endowment of a college in the midst. They held public meetings and discussed plans for raising money for the erection of the college building, the defendant below, Fulton, being a resident of said city, and actively engaged with others in the work of securing said money. The consultations in relation to the method of obtaining the means to secure the erection of a college building finally resulted in an understanding that a corporation should be created which should take control of the business of erecting such building; that said corporation should purchase land in a body, and cut it up into blocks and lots and sell the same, and from the profits thus obtained raise a portion of the money with which to erect said college building. It was also agreed that subscriptions should be solicited among the residents of the city, to further aid in the construction of said building. In pursuance of this understanding, the Sterling Land and Investment Company was incorporated, and the subscriptions contained in the subscription list herein copied were obtained.

It was the understanding, from the inception and adoption of the plan pursued for raising money, that the subscribers to the fund for the erection of the college building should be permitted to select and have lots in the company's addition—that is, in the land purchased and subdivided by the company—equal in value with their several subscriptions. The company purchased land, subdivided it, and—except what was taken by the subscribers to the college fund—sold what it could of it, and used the proceeds of such sales in the con-

struction of a college building. It was also understood that a second corporation should be created, known as the Cooper Memorial, College of Sterling, Kas., that should accept the college building when completed, endow the college, and agree to conduct a school therein. The subscription list was turned over to the Sterling Land and Investment Company, which erected the college building and turned it over to the trustees of the Cooper Memorial College, which accepted it.

Construing the instrument sued on in this case in the light of these endeavors, understandings, and accomplishments, with the petition declaring that it was understood by each subscriber to said instrument, including Fulton, that the Sterling Land and Investment Company was to erect the college building, and that the money subscribed should be turned over to said company to be used in the construction thereof, and with a finding of the court in favor of the company upon these allegations, it is not difficult to arrive at the conclusion that the undertaking of Fulton was with the plaintiff below. The last clause of the instrument itself lends decided aid and comfort to this view of the question. It says: "And each subscriber is entitled to lots to the amount of their subscription in the investment company's addition." What investment company, and what addition? It is difficult to determine what company and what addition from the face of the instrument, but with a knowledge of what occurred in connection with the making of said instrument, and the purpose for which it was made, knowing by whom the college building was erected and how the money was to be and was raised for its construction, and also that the understanding was, at the time the subscriptions were made, that the subscribers were to have lots in the Sterling Land and Investment Company's addition equal in value to the amount of their subscriptions, it is very plain that the company referred to in the instrument is the Sterling Land and Investment Company, and the addition referred to is the addition of that company, or the land purchased by that company and subdivided into lots for the purpose of obtaining in part money to construct the college building.

---

Opinion of the Court.

---

Although the subscriptions in the list are, in said list, said to be donations to the Cooper Memorial College building, yet it is evident from all the surrounding facts and circumstances and understandings that the subscriptions were to a fund which was to be used in the construction of the college building. It is also evident from the same sources that the subscriptions were not absolute donations to any person or corporation, since the subscriber was to receive lots in equal value with his subscription in consideration thereof. It is also evident from the sources enumerated, that the lots promised were to come from the plaintiff below, and to that extent the consideration moved from the said plaintiff to the subscribers. The Cooper Memorial College was to do nothing for anyone except to take the college building when completed and agree to conduct a school therein. It did not undertake to do anything until after the building was completed. It had no duty to perform so far as Fulton was concerned, except the duty alike toward him and all the people of the city, of conducting a school in the college building, after completed and accepted. We think it entirely proper to say, upon the whole record, that the promise and undertaking of Fulton was with the plaintiff below, and we so hold.

But as the subscriptions, upon the face of the instrument alone, seem to be a donation to the Cooper Memorial College, of Sterling, Kas., and as the instrument declares that the commencement and building of the college shall be considered and held as a full consideration for the subscriptions and obligation to pay the same, and as the petition alleges the transfer of the subscriptions to the plaintiff below and the court found in its favor, we could also, with perhaps equal propriety, hold the undertaking, though nominally with the Cooper Memorial College, to be for the benefit of the said plaintiff, and still affirm the judgment of the court below, upon the well-known rule of law that a contract between two persons for the benefit of a third may be enforced by him for whose benefit it is made. To this view of the case it is objected, that the

---

Fulton v. Land Co.

---

Cooper Memorial College was not incorporated until nine days after the subscriptions (including Fulton's) were made. We do not, however, think this a valid objection. We think a subscription for the benefit of a corporation not yet in existence is binding on the subscriber, if made with the understanding that a charter is being obtained, and it is obtained in accordance with the subscriber's understanding at the time of his subscription.

Upon the theory that the undertaking of Fulton was with the plaintiff below, and that the subscription was to be used by the plaintiff in the construction of a college building to be erected by the plaintiff, it is objected that the plaintiff had no power to make a contract that would bind itself or Fulton, by the terms of which the plaintiff company was to erect a college building; that the construction of a college building is *ultra vires* the powers of the plaintiff as defined in its charter.

The charter of the Sterling Land and Investment Company declares that the purpose for which the corporation is formed is "to buy, own and sell real and personal property, and to improve the same." The charter confers express power upon the corporation, not only to buy and sell both real and personal property, but also to improve the same. We think it might be held that the building of a college upon a small piece of land a part of the larger tract purchased by the corporation, and which is surrounded by the lands of the corporation, is an improvement of the lands of the corporation. The building of the college certainly enhanced the value of the lands owned by the corporation, and in that sense improved them. But whether or not the charter conferred express power upon the corporation to build the college, still, within the decisions of this court, the corporation had power to build the college, or do anything else the direct and proximate tendency of which would be to improve the property of the corporation by enhancing its value, or to render it more desirable and salable. (*Whetstone v. Ottawa University*, 13 Kas. 320; *Town Co. v. Russell*, 46 id. 382.)

We think this disposes of all the questions in this case. It is therefore recommended that the judgment of the district court be affirmed.

By the Court: It is so ordered.

All the Justices concurring.

---

THE CHICAGO, KANSAS & NEBRASKA RAILWAY COMPANY  
V. GEORGE W. HOTZ.

RAILROAD COMPANY—*No Cattle-Guards—Negligence.* The defendant railway company failed and neglected to construct or maintain cattle-guards where its line of railroad entered and left an inclosed pasture. During the time of such neglect, the owner of the pasture attempted to keep his stock from straying by herding the same. One day the herder left the stock to go to dinner. While absent, a cow strayed away, got into a creek, and mired down. *Held*, If the creek was at a great distance from the pasture, or if the miring of the cow was something extraordinary and not to be expected, and it could not be said that the neglect of the railway company was the proximate cause of the loss of the cow, the company would not be liable therefor.

*Error from Meade District Court.*

THE facts appear in the opinion. Judgment for plaintiff, *Hotz*, on April 11, 1889. The defendant *Railway Company* brings the case to this court.

*M. A. Low*, and *J. E. Dolman*, for plaintiff in error.

The opinion of the court was delivered by

HORTON, C. J.: This action was commenced by George W. Hotz before a justice of the peace of Meade county, to recover damages alleged to have been sustained by reason of the failure and neglect of the Chicago, Kansas & Nebraska Railway Company to construct and maintain cattle-guards where its line of railroad entered and left his land. A judgment was



---

C. K. & N. Rly. Co. v. Hotz.

---

rendered against the railway company before the justice, and an appeal taken to the district court. In that court, judgment was rendered against the railway company for \$30. The company excepted to the judgment, and brings the case here. Upon the trial, the court gave the following instruction, among others, to the jury:

"If you should find from the evidence that the plaintiff used such inclosure for a cattle pasture, and that by reason of the refusal and neglect of the defendant to make proper cattle-guards at the points designated in the foregoing instructions, any of his cattle escaped from the pasture at the point where defendant's road enters such pasture, or at the point where defendant's road leaves such pasture, and wandered away from such pasture into a mire-pond, sink-pond, or slough, and there died, then it will be your duty to determine from the evidence the value of such animal or animals so dying, and return a verdict in favor of the plaintiff therefor."

The only evidence embraced in the record to which this instruction could in any possible manner apply is the following from the plaintiff below:

"Ques. Describe the land that you owned and possessed before the building of the Chicago, Kansas & Nebraska railway through this county. Ans. The northeast quarter of section 15, township 31, range 27 west.

"Q. Now state what improvements, in reference to buildings, fences and other things you had on this land before the Chicago, Kansas & Nebraska Railway Company built this line of road through this county. A. I had it fenced, and was using it for a pasture.

"Q. Describe what kind of a fence it was. A. It was a three-wire fence.

"Q. State what the Chicago, Kansas & Nebraska Railway Company did with reference to passing through that land while they were building their road. A. They cut the fence open and built the road through.

"Q. Did they leave it open? A. Yes, sir; they left it open.

"Q. When was the Chicago, Kansas & Nebraska railway built through this county, and over the land that you have described? A. They went through about the 1st of February, 1888, I believe.

---

Opinion of the Court.

---

"Q. Now, how long after the Chicago, Kansas & Nebraska Railway Company built through that field or close that you have described did they build any cattle-guards? A. They put the cattle-guards in about the 1st of July.

"Q. Of what year? A. 1888.

"Q. Now, Mr. Hotz, you may state to the court and jury in what particular way you were damaged by reason of the railroad's failure to build cattle-guards when entering your land and leaving it. State all about it. A. Well, I had to herd the cattle—that is, in the beginning; in the early spring I had to keep them in the corral, and had to feed them. After my feed run out, I had to herd them in the pasture to keep them from going out.

"Q. Tell the court and jury all about it; how much herding you did. A. Well, it took time to herd them from about the 1st of April to the 1st of July, and there was one cow that strayed out, and got into the creek and died.

"Q. Now, you may state the value of that cow. A. She was appraised at \$40.

"Q. State what was the value of that cow. A. She was worth \$30.

"Q. Now, Mr. Hotz, you tell the jury all about how that cow happened to stray out of your field and from the railway track, and why. Tell all about that. A. She strayed out on Sunday; the boy was herding the cattle and had to go home to dinner, and while he was at the house for noon the cow got out, and got into the creek and mired down."

Upon the evidence introduced, the instruction was misleading and erroneous. The evidence does not show clearly that the cow escaped at the point where the railroad entered or left the pasture; but if it does, there is no evidence tending to show there was any pond or slough near or close by the pasture. The evidence is that the cow got out of the pasture and into a creek and mired there. The words "mire-pond, sink-pond, or slough" were not used in the evidence. There was no evidence showing where the creek was situated, excepting that it was outside of the pasture. It might have been one mile, two miles, five miles, or further away. The death of the cow in the creek might have been something extraordinary and not to be expected; this would be the case if the creek was a great or a considerable distance away from the pasture. If the creek

Ft. S. W. &amp; W. Rly. Co. v. Tubbs.

was the proximate cause of the cow's death, then the railway company is not liable. (*Fales v. Cole* [Mass.], 26 N. E. Rep. 872.)

The judgment of the district court will be reversed, and the cause remanded.

All the Justices concurring.

### THE FORT SCOTT, WICHITA & WESTERN RAILWAY COMPANY V. M. C. TUBBS.

1. **FIRE Set by Locomotive—Pleading and Proof.** In an action against a railway company for damages by fire caused by the operation of such railway, under § 1821 of the General Statutes of 1889, it is only necessary to allege and prove that the fire complained of was caused by the operation of the defendant's railway, to make out a *prima facie* case.
2. **INSTRUCTION—No Error.** Instruction given and refused considered, and found that the trial court committed no error.
3. **PETITION—Findings—Verdict—Case, Distinguished.** Where the plaintiff alleged in his petition that the negligence of the defendant consisted in the omission to keep its roadway clean, and that it negligently allowed dry grass to accumulate and remain on the line of its right-of-way, and the jury returned a special finding that the fire was caused by defective engine, in allowing coals of fire to drop from the fire-box and ignite the dry grass on the right-of-way, *held*, that the special finding and general verdict of the jury were in accord with the allegations of the petition, notwithstanding the fact that the petition contained no statement charging that the engine was defective. The case of *St. L. & S. F. Rly. Co. v. Fudge*, 39 Kas. 543, distinguished.
4. ——— **Contributory Negligence.** In an action under § 1821 of the General Statutes, the plaintiff is not chargeable with contributory negligence for a mere failure to take precautions against the negligence of the defendant.
5. **ATTORNEY'S FEE—Demand—Jury.** Where the plaintiff desires to recover an attorney's fee, in an action instituted under § 1821 of the General Statutes, he should demand the same in his petition; and when the case is tried by a jury, the question of attorney's fee should be submitted, with the other facts in the case, to the jury.

*Error from Greenwood District Court.*

ACTION by *Tubbs* against the *Railway Company*, to recover damages by fire claimed to have been caused by defendant's negligence. Verdict and judgment for plaintiff. The defendant comes to this court.

*J. H. Richards*, and *C. E. Benton*, for plaintiff in error;  
*D. B. Fuller*, of counsel.

*R. C. Summers*, for defendant in error.

Opinion by GREEN, C.: This was an action brought by M. C. *Tubbs* in the district court of Greenwood county against the Fort Scott, Wichita & Western Railway Company, for damages by fire, caused, as is claimed, by the negligence of the defendant in the operation of its railroad. The plaintiff alleged that he owned a half-section of land which he used exclusively for the grass grown thereon for hay, and expected to use all of said land for that purpose except about 40 acres, as such land was well adapted for the growing of hay. The negligence of the defendant is stated as follows:

"Plaintiff says that defendant's line of railway runs through, over and across the north part of said plaintiff's land described, and that on the 29th day of October, 1887, the said defendant, contrary to its duty, and negligently and carelessly, omitted to keep its right-of-way on plaintiff's land and on the adjoining land clear and clean of dry grass, weeds, and other combustible material, and on the contrary, negligently and carelessly allowed dry grass, weeds and other combustible material to accumulate and remain on said right-of-way of said defendant's railway, and neglected to plow a fire-guard along said line of railway, and on said right-of-way across plaintiff's land, and across the adjoining land, to prevent the spread of fire, or damage therefrom, in the operation of its said line of railroad; that on the 29th day of October, 1887, the defendant, in operating its line of railway, and running its engines and cars on said line of railway in Greenwood county, Kansas, by and through its servants, employes, and agents, in thereby operating and running said cars and engines thereon, in said

---

Ft. S. W. & W. Rly. Co. v. Tubbs.

---

county and state, negligently and carelessly permitted said engine of defendant to cast out or emit sparks and coals of fire therefrom, into the dry grass and weeds and other combustible material on defendant's right-of-way, thereby setting out fire and setting fire thereto, and carelessly and negligently allowing the fire thus set out on defendant's right-of-way to escape and spread therefrom to other lands, and finally to plaintiff's land and meadow, thereby burning and injuring plaintiff's meadow, greatly damaging plaintiff, in the sum of \$1 per acre, or the total sum of \$275, and without any fault or negligence on the part of this plaintiff, on account of said fire.

"Wherefore, plaintiff asks judgment against defendant in the just sum of \$275 and costs of suit, and for \$50 attorney fees, and all other proper relief."

The railway company filed a motion to make this petition more definite and certain: (1) By stating wherein the meadow was damaged; (2) by stating how much, if anything, plaintiff claimed for the burning of the hay growing upon the land; (3) by stating whether damages were claimed for the burning of the hay growing upon the land at the time of the fire; (4) by stating in what manner the land was damaged, if damages were claimed for injury to the realty. This motion was overruled, and exceptions taken. The defendant then filed a general demurrer to the petition, which was also overruled. The defendant afterward filed a general denial, and also set up contributory negligence. At the January term, 1889, a trial was had by the court and a jury, and a verdict was returned in favor of the plaintiff for \$85. After the return of the verdict, over the objection of the defendant, the plaintiff offered evidence to the court as to the value of attorney's fees in the case, and the court allowed the plaintiff \$50 as such attorney's fees. Judgment was rendered for the plaintiff for \$135 and costs. A motion for a new trial was filed and overruled.

Six questions are presented by this record: 1st, Did the court err in overruling the motion of the defendant to require the plaintiff to make his petition more definite and certain? 2d, Did the court err in its instructions to the jury? 3d, Did the court err in refusing certain instructions asked by the de-

## Opinion of the Court.

fendant? 4th, Did the court render judgment upon a cause of action not made by the pleadings? 5th, Should judgment have been rendered upon the special findings in favor of the defendant? 6th, Did the court err in rendering judgment against the defendant for attorney's fees?

We must answer each one of these questions in the negative, except the last. As to the first, the petition was, we think, sufficient, under ¶ 1321 of the General Statutes of 1889. It might have been more general as to the allegations of damages than it was, and still been good under the statute.

As to the instructions given with reference to the measure of damages, complaint is made of the following paragraph:

"In case you find from the evidence that the plaintiff is entitled to recover in this case, you are instructed that the damages to be awarded him should be such as adequately to compensate him for the actual loss or injury sustained; and in determining the amount of injury, you should consider the nature and character of the land in controversy, the uses to which it was put, the difference, if any, in its rental value; and you may also allow interest on such damage, if any you find, from the date of the loss to the present time, at the rate of 7 per cent."

It is urged that this instruction was misleading; that under no circumstances would the plaintiff be entitled to recover the difference between the value of the land before and after the fire and also the difference in the rental value. Perhaps the decrease in the rental value of the land forms the better and more certain rule by which the damages may be estimated; still the principle has been established, that where the injury is done to the real estate itself, the damages may be measured by the difference in the value of the land before and after the trespass; and, in several cases, the amount necessary to restore the property to the condition in which it was before the trespass is a proper measure of damage. (5 Am. & Eng. Encyc. of Law, p. 36; *Wiley v. Hunter*, 57 Vt. 479; *Carli v. Depot &c. Co.*, 32 Minn. 101; *Vermilya v. Chicago &c. Rly. Co.*, 66

1. Fire set by locomotive—pleading and proof.

2. Instruction—  
no error.

Iowa, 606.) It is evident from the amount of the verdict that the jury were not misled by the instruction, and hence no prejudicial error was committed.

Upon the third question, complaint is made that the court should have instructed, as requested by the defendant, that the plaintiff could not recover unless the injury complained of was permanent in its nature, although he may have sustained other damages as the result of the fire. The plaintiff did not allege that his meadow was permanently damaged, and the evidence was to the effect that it would take from one to three years to restore the grass to the condition it was in before the fire; so it would not be proper to characterize the injuries as permanent. We think the instruction was properly refused.

As to the fourth question, it will be observed, by a reference to the allegations of this petition, that the plaintiff alleged carelessness in failing to keep the right-of-way free from grass and other combustible material, and the negligence of the servants of the railway in operating and running its cars and engines. As to the allegation of negligence, the jury made the following special findings of fact:

"Ques. 1. Did the fire escape by accident? Ans. Don't know.

"Q. 2. Did the fire escape because of the negligence of the employes of defendant while operating defendant's train? A. We do not know.

"Q. 3. Did the fire escape by reason of the engine being out of order? A. We think so.

"Q. 4. State specifically what negligence defendant was guilty of, upon which the jury base the verdict—whether defective engine, condition of right-of-way, or negligence of its servants in operating the train, or all. State fully in what such negligence, if any, consisted. A. By defective engine, in allowing coals of fire to drop from fire-box and ignite the dry grass on the right-of-way."

The point is now made that the jury specially found that the negligence upon which the verdict is based was a defective engine, and there being no allegation of the kind in the petition, the judgment of the district court was rendered upon a

## Opinion of the Court.

case not made by the pleadings. The case of *St. L. & S. F. Rly. Co. v. Fudge*, 39 Kas. 543, is relied upon as being precisely in point. If the present statute (§ 1321 of Gen. Stat. of 1889) had been in force when the injuries in that case occurred, or when that action was brought, or when the issues in that action were made up, or if the jury had returned the same answers in this case that were returned in that, the posi-

3. Petition—find-  
ings—verdict  
—case, distin-  
guished.

tion of counsel for plaintiff in error might be correct. But in all these particulars this case differs from that. The Fudge case was decided, or at least intended to be decided, under the old law and not under the present law, as embodied in the aforesaid § 1321 of the General Statutes of 1889. And further: In the Fudge case the jury said that the fire escaped either by the negligence of the servants of the railway company or a defect in the engine; in this case, by defective engine, in allowing coals of fire to drop from the fire-box and ignite the dry grass on the right-of-way. The defect in the engine might have been harmless if there had been no dry grass on the right-of-way. Coals, ashes and cinders are removed from the fire-box of engines upon the right-of-way, but this is usually done where there is no combustible matter to be ignited. The simple dropping of coals from the fire-box might not be a defect in an engine. We think there is sufficient in the special findings, taken in connection with the general findings of the jury, to bring the verdict and judgment within the first paragraph of plaintiff's petition.

As to the fifth question, the plaintiff in error contends that the answers of the jury establish the fact that the railroad company was not guilty of the negligence alleged in the petition. This position, as we have seen, is not tenable, for the reason that the coals of fire dropped from the fire-box and set fire to the dry grass on the right-of-way. It is further urged, that the findings show that the plaintiff was guilty of contributory negligence, for the reason that he did nothing to prevent the spread of fire upon his land. Where a party uses his land as a reasonably prudent man should, and for the purposes for



## 4. Contributory negligence.

which it is adapted, he is not chargeable with contributory negligence for a failure to take precautions against the negligence of a railway company. (8 Am. & Eng. Encyc. of Law, 16.) Chapter 155 of the Laws of 1885 established the rule that the occurrence of a fire caused by the operation of a railroad is *prima facie* evidence of negligence; so that a mere finding of the jury that the plaintiff did nothing to protect his land would not make him guilty of contributory negligence. In *Philadelphia &c. Co. v. Hendrickson*, 80 Pa. St. 182, Chief Justice Agnew stated the rule under the common-law liability as follows:

"The conclusion from the case is very clear, that a plaintiff is not responsible for the mere condition of his premises lying along a railroad, but in order to be held for contributory negligence must have done some act or omitted some duty which is the proximate cause of his injury, concurring with the negligence of the company. Farmers may cultivate, use and possess their farms and improvements in the manner customary among farmers, and are not bound to use unusual means to guard against the negligence of a railroad company; indeed, are not bound to expect that the company will be guilty of negligence."

The same court subsequently held—

"That it was not contributory negligence for the owner of land along the line of a railroad to allow the accumulation of leaves, brushwood and other rubbish on his property. Such an owner of property must run the risk of fires necessarily following the lawful and proper use of the railroad company's locomotives; but that he must guard, in any way or by any means, against the improper or unlawful use of locomotives, is a proposition that cannot be sustained." (*Philadelphia &c. Co. v. Schultz*, 93 Pa. St. 341.)

We are not prepared to say that this would be the correct rule in states subject to prairie fires, but it shows the extent to which some courts have gone upon the question of contributory negligence. In this case we are clearly satisfied that the findings of the jury did not establish contributory negligence.

The last question we shall have to answer in the affirmative. After the jury had returned a verdict the plaintiff asked

the court to assess the amount plaintiff was entitled to as attorney's fees. This was error. The question of attorney's fees was one of the issuable facts in the case, and should have been submitted with the other facts to the jury and been determined in the same way. (Mo. Pac. Rly. Co. v. Merrill, 40 Kas. 404; Ft. S. W. & W. Rly. Co. v. Karracker, 46 id. 511.) It is recommended that the judgment of the district court be modified by striking out the \$50 allowed as attorney's fees, that the judgment for \$85, based upon the verdict of the jury, be affirmed, and that the costs of this court be equally divided between the parties to this action.

By the Court: It is so ordered.

All the Justices concurring.

---

THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY  
V. MARTHA JANE SNAVELEY.

47	637
58	450
47	637
666	626
166	629

1. *Fire Caused by Locomotive—Pleading.* In an action against a railroad company for damages caused by fire, where the plaintiff alleges in his pleading facts sufficient, which would, if proved, make out a *prima facie* case against the railroad company under chapter 155 of the Laws of 1885, (Gen. Stat. of 1889, § 1321,) sufficient facts are alleged to constitute a cause of action against the railroad company.
2. *Motion to Make Definite.* A motion made by the defendant to require the plaintiff to so amend his pleading as to make it more definite and certain is generally made too late when it is not made until after the case is called for trial.

*Error from Wilson District Court.*

THE opinion states the facts.

Geo. R. Peck, A. A. Hurd, and Robert Dunlap, for plaintiff in error.

J. K. Demoss, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought before a justice of the peace of Wilson county, on December 12, 1888, by Martha Jane Snaveley against the St. Louis & San Francisco Railway Company, to recover for alleged injuries to her property resulting from fire caused by the railway company in the operation of its railroad. The bill of particulars of the plaintiff filed in the justice's court, omitting title and signature, reads as follows:

"The plaintiff alleges the defendant is an incorporated railway company, incorporated under the laws of the state of Missouri, and doing business in the state of Kansas; that she is the owner of a farm of 160 acres of land just east of Nodessa, in Wilson county, Kansas; that the defendant railroad runs through her said farm; that in the operation of said railroad the defendant set fire to and burned up her corn and fodder and grass and killed her meadow, in the fall of 1887, and this damages her in the sum of \$30. And plaintiff further alleges that the defendant, in the operation of said railroad during the last past fall, set fire to and burned up her hay, grass, pasture, and hedge fence, and thus damaged her in the sum of \$50; that the said defendant, the St. Louis & San Francisco Railway Company, has neglected and failed and refused to pay to her her said damages, or any portion or part thereof, although often requested so to do. Wherefore she brings suit, and prays the court to give her a judgment against said defendant company for \$80, and for costs of suit. And plaintiff says it is necessary for her to employ an attorney to prosecute her suit, and therefore she employs an attorney so to do, and that his services are reasonably worth \$50. Wherefore she asks for a judgment for her attorney's fees for \$50, in addition to her loss so as above stated, and for which she will ever pray."

Judgment was rendered in the justice's court in favor of the plaintiff and against the defendant, and the defendant appealed to the district court. The appeal was taken on December 18, 1888, and the transcript and papers were filed in the district court on December 29, 1888. Nothing was done in the case in the district court of any importance until Feb-

---

Opinion of the Court.

---

ruary 11, 1889. The following journal entry will show what then and afterward, up to and on February 14, 1889, occurred :

"Sixth day, February term, the same being Monday, February 11, 1889. And now on this day, at 8:30 A. M., this cause came on for trial, it being regularly set for trial at said time, plaintiff being present both in person and by attorney, and the defendant came not. Thereupon the court on its motion passed the cause to 2:00 P. M. this day, and at said time the plaintiff appeared as before, and the defendant appeared by Mansfield, Eaton & Pollock, its attorneys; and thereupon the case being called for trial, the defendant asked leave of the court to file its motion to require the plaintiff to make her bill of particulars more definite and certain, which request the court held came too late, and overruled and denied the same, to which ruling of the court the defendant then and there duly excepted; and thereupon a jury was impaneled and sworn to try the case, consisting of the following-named persons: Benj. Seem, Geo. Sherbenow, S. Williams, Wm. Potter, Nathan Nelson, S. D. Roberts, J. G. Eby, J. M. King, Geo. Shelly, S. L. Friedline, J. H. Koger, Henry Dixon; and thereupon the plaintiff offered to introduce her evidence in support of her allegation in her bill of particulars contained, to which the defendant by its attorney objected, because said bill of particulars stated no facts sufficient to constitute a cause of action against the defendant, pending the discussion of which said objection the plaintiff asked leave to amend her bill of particulars; whereupon the court granted plaintiff leave to amend her bill of particulars *instantly*, to which ruling of the court the defendant objected and excepted; and thereupon the defendant made its application for a continuance of said cause; and thereupon the court upon his own motion continued said cause until Thursday, the 14th day of February, 1889, at 8:30 A. M. of said day, and discharged the jury from the consideration of the cause; and thereupon, on the 11th day of February, 1889, the defendant filed its motion to require plaintiff to make her bill of particulars more definite and certain, which motion was never called up nor called to the attention of the court. And now, upon the ninth day of the February term of this said court, the same being Thursday, the 14th day of February, 1889, this said cause again coming on for trial, thereupon the defendant presented a motion filed this day, February 14, 1889, and requiring plaintiff to make her amended bill of particulars more definite and certain, which said motion the court

held came too late, and thereupon the court overruled the same, to which ruling of the court the defendant duly excepted, which exception was by the court allowed; and thereupon this cause came on to be heard upon the motion of defendant to strike the amended bill of particulars of plaintiff from the files of the court, which said motion was by the court overruled, to which action of the court in overruling the said motion the defendant duly excepted; and thereupon the court ordered a jury called to try the said cause, and a jury of 12 good and lawful men, composed as follows: Benj. Seem, Geo. Sherbenow, S. S. Williams, Wm. Potter, Nathan Nelson, S. D. Roberts, Thos. Frazier, J. M. King, Geo. Shelly, S. L. Friedline, Henry Dixon, T. F. Carnegie, were duly impaneled and sworn to try the cause; and thereupon the plaintiff offered to introduce her evidence in support of her bill of particulars, to which the defendant did then and there object to, for the reason that said bill of particulars did not state facts sufficient to constitute a cause of action against this defendant, which objection was by the court overruled, to which ruling of the court the defendant duly excepted, and the defendant then and there announced that it would proceed with the trial of this cause only under protest; and thereupon the plaintiff offered her evidence tending to prove the allegations in her bill of particulars and rested her cause; and thereupon the defendant interposed by its attorneys a demurrer to the evidence, which demurrer was by the court overruled, to which ruling of the court the defendant duly excepted; and thereupon the defendant not offering any evidence, the cause was submitted to the jury under the instructions of the court without argument by counsel; and thereupon the jury retired to consider upon the verdict, and upon the same day returned into open court the following verdict, to wit: 'We, the jury, find for the plaintiff, and we assess the amount of her damage, against the defendant, at \$76.30. We find and allow her as a reasonable attorney's fee for the prosecution of the action the sum of \$35. Total amount allowed, \$111.30.'

Afterward a motion for a new trial was filed by the defendant and overruled by the court, and judgment was then rendered by the court in favor of the plaintiff and against the defendant, in accordance with the verdict of the jury; and the defendant, as plaintiff in error, has brought the case to this court for review.

## Opinion of the Court.

The plaintiff in error, defendant below, claims that "the court [below] erred in compelling the defendant to proceed to trial and in overruling the motion to make the bill of particulars more definite and certain." This action was brought under chapter 155 of the Laws of 1885. (Gen. Stat. of 1889, ¶ 1321.) That statute has been held by this court to be constitutional and valid. (*Mo. Pac. Rly. Co. v. Merrill*, 40 Kas. 404.) And it has also been held by this court, that under it proof that a fire which caused the injuries complained of was caused by a railroad company in the operation of its railroad was *prima facie* evidence of negligence on the part of the railroad company in causing the fire. (*Ft. S. W. & W. Rly. Co. v. Karracker*, 46 Kas. 511.) And it has further been held by this court, in the case of *Ft. S. W. & W. Rly. Co. v. Tubbs*, just decided, that under that statute whenever sufficient facts are alleged in the plaintiff's pleading which would, if proved, make out a *prima facie* case against the railroad company, sufficient facts are alleged to constitute a cause of action against the railroad company. It might be better to plead negligence expressly, but when a plaintiff has alleged all the facts which he is required to prove to make out a *prima facie* case, it would seem that his pleading ought to be held to be good. It would be good as against a general demurrer, good upon a motion in arrest of judgment, and sufficient to support a judgment. It is not possible to suppose that the railroad company was misled or taken by surprise; but after the plaintiff's bill of particulars was amended so as to insert allegations of negligence the court gave to the railroad company three more days within which to prepare for trial, which, so far as is shown, was ample time within which to make such preparation, and within which it had the privilege of bringing in its evidence. The only amendment that was made to the plaintiff's bill of particulars was as follows: In the first paragraph the words "through negligence" were inserted, so as to read, "The defendant *through negligence* set fire to and burned up her corn," etc. In the second paragraph the word "negligently" was inserted, so as to read, "The defendant in the

---

 Cackley v. Smith.
 

---

operation of said railroad during the last past fall *negligently* set fire to and burned up her hay," etc. There was certainly no error in requiring the defendant to go to trial on February 14, 1889, after all the delay that had previously occurred, and after the ample notice that the railroad company had of what the plaintiff claimed; nor was there any error committed by the court in overruling the defendant's motion to require the plaintiff to make her bill of particulars more definite and certain. The only motion of that kind that was overruled by the court was one not filed until February 14, 1889, after one trial had been had before the justice of the peace, and after the case had been three times regularly called for trial in the district court—once in the forenoon of February 11, 1889, when the defendant did not appear, once in the afternoon of that day, and once on February 14, 1889. We think the court below decided correctly that the motion was made too late. The defendant was deprived of no substantial right; and it was too late when the case was called for trial for the defendant to ask for favors of that kind.

The judgment of the court below will be affirmed.

All the Justices concurring.

---

 WILLIAM CACKLEY V. SAMUEL J. SMITH.

RES JUDICATA—*Merger*. An action instituted in another state to have certain conveyances set aside and subject the property described therein to the payment of the plaintiff's judgment and the claims of all other creditors who might come and set up their demands, is not a bar to an action brought by one of such creditors in this state upon a promissory note owned by him, notwithstanding the fact that he appeared in the former action, filed a cross-petition, and obtained a finding from the court of the amount due him upon his note, but did not obtain a personal judgment against the defendant in that action, nor receive anything from the sale of the property affected by such proceeding. To constitute a merger, there must be a valid and subsisting judgment rendered on the cause of action.

47 642

47 647

47 642

52 702

---

Opinion of the Court.

---

*Error from Rice District Court.*

SUIT by *Smith* against *Cackley* on a promissory note. Judgment for plaintiff, at the April term, 1889. The defendant comes here. The opinion states the facts.

*M. A. Thompson*, for plaintiff in error.

*J. W. Brinckerhoff*, for defendant in error.

Opinion by GREEN, C.: Samuel J. Smith sued William Cackley in the district court of Rice county upon a promissory note for \$1,254.90, executed on the 1st day of January, 1884, and due in 12 months after date, with interest at 8 per cent. per annum. The defendant alleged that this note had been merged into a judgment rendered in the court of common pleas of Jackson county, Ohio, in an action brought by the Centerville National Bank, of that county. This bank brought an action against William Cackley and Sarah E. Spriggs, to have a certain conveyance of some real estate made by Cackley to Spriggs set aside. The plaintiff in that case had previously obtained a personal judgment, and asked that the conveyance be declared fraudulent as to the creditors of Cackley, that the property be administered for the benefit of the plaintiff and all other creditors who might come in and be entitled to share in the proceeds according to their respective claims and priorities. Summons was served upon the defendants, and notice was given by publication to the creditors of Cackley. The plaintiff below was one of the creditors, and he filed a cross-petition, setting forth the note sued on in this action, and asked to be made a party, and that the lands described in the petition of the Centerville National Bank be sold and administered for the benefit of all of the creditors of Cackley, that an account be taken of the amount due him on his note, and that he be paid out of the proceeds of the sale of the property according to priority. The action of the bank was successful; the conveyance was set aside. A certain deed of assignment made by Cackley was also set aside and a trustee was appointed by



the court, who was authorized to sell the property that had been fraudulently disposed of, and pay the creditors of Cackley according to priority. The trustee, acting under the orders of the court, sold the property, and the court found the amount due and owing the various creditors, and directed the payment of the costs and attorney's fees first, and then the payment of certain creditors in full, which left the claim of Smith unpaid. Upon this state of facts, the plaintiff asked and obtained a judgment upon the pleadings for the amount due upon his note, in the district court of Rice county.

The only question presented by the record is, whether this was error. Was the note sued upon merged in the proceedings in the common pleas court of Jackson county, Ohio? We are obliged to answer this question in the negative. To make the merger complete, so as to be a bar to any future action upon the same obligation, there must necessarily be a judgment; and such a judgment, too, as can be enforced. Can it be said in this case that the plaintiff below obtained such an order in the common pleas court of Jackson county, Ohio, as he could make available in the collection of his debt after the property subjected to the payment of certain creditors of Cackley had been exhausted? or, in other words, could he have brought suit upon the proceedings had in that court and obtained any relief? There was only a finding of the amount due each one of the creditors; and in the same finding of the court there was an order directing the payment of the proceeds to other creditors, which left the plaintiff below in the same condition as when he filed his answer. He had obtained nothing upon his note, and had no order, decree or judgment which he could enforce. The supreme court of Ohio seemed to have taken this view of a similar order in the case of *Conn v. Rhodes*, 26 Ohio St. 645, which was an action to foreclose a mortgage, with a prayer for a personal judgment. Upon default of an answer, the court entered a decree for the sale of the mortgaged premises, but rendered no personal judgment. The court said:

"Where the record in such case showed that the court, on

hearing of the cause, 'considered that the plaintiff ought to recover' a specified amount, and ordered the sale of the mortgaged premises for its satisfaction, *held*, that the record shows no personal judgment against the defendant, but a mere finding of the amount due, with an order of sale."

Judge Cooley said, in the case of *Wixom v. Stephens*, 17 Mich. 518: "If, by reason of the mistake, the judgment rendered by the justice was not valid, so that the plaintiff could enforce it, then it would seem that it could not constitute a bar to a new suit on the note. The bar in such case springs from the party having already obtained a higher security; and where he has got no new security, his remedy upon the original demand is not taken away." The law of the case was stated in the syllabus, that "a debt is not merged in a judgment until a valid judgment has been obtained upon it."

The supreme court of Nebraska has held that the presentation and proof of a creditor's claim in Illinois against an assigned estate there is not a bar to such creditor's right of action in the former state, there being nothing in the statute of Illinois or in the deed of assignment restricting creditors to their respective demands, or suspending any other remedy previously opened to them. (*Gross v. Bunn*, 10 Neb. 217.)

The law of merger is thus stated in Black on Judgments, § 674:

"But in order that the principle of merger may apply, it is necessary that the identical cause of action should have passed into judgment, in a litigation between the same parties or their privies, and that the plaintiff should have had a full and complete opportunity to recover his whole demand. In a case in Arkansas, it was held that a judgment against a steamboat—that being a judgment *in rem* and not enforceable against the property of the owners—if unsatisfied, could not be pleaded as a bar to a subsequent action against the owners of the boat on the same contract. In reaching this conclusion, the court said it was evident that a judgment against the vessel was not even substantially a judgment against the owners, and consequently that the former recovery relied on was no bar to the present action." (*Toby v. Brown*, 11 Ark. 308; *Freeman*, Judgm., § 606.)

---

Cackley v. Smith.

---

If the action in the Ohio court is to be treated as a proceeding *quasi in rem*, clearly the note of the plaintiff below was not merged in the orders made by the court in that case. Text-writers and courts make a distinction between actions *in rem* and proceedings *quasi in rem*, and the latter term is applied to suits brought against persons where the plaintiff's object is to subject certain property of those persons to the payment of the claims asserted.

"Such are actions in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the state, and actions for the enforcement of mortgage and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demand of the plaintiff are in a general way thus designated." (*Freeman v. Alderson*, 119 U. S. 187; Black, Judgm., § 793.)

The action of the Centerville National Bank, in the Ohio court, comes unmistakably within this class of cases. Such a proceeding of a domestic as well as a foreign court, where jurisdiction over the person of a party has not been obtained, except as to his interest in the property affected by such proceedings, is not conclusive or binding by way of estoppel in another action. (*Durant v. Abendroth*, 97 N. Y. 132; *Freeman*, Judgm., § 606.)

The same doctrine is stated in *Res Adjudicata* (Wells), § 555:

"As to actions *in rem*, we may here state in general terms that there can be no rightful action by the tribunal on the basis of jurisdiction acquired by the attachment of property that can reach beyond the property itself, and of course it cannot be enforced in another state."

It necessarily follows from this view of the law that the district court committed no error in sustaining the demurrer of the plaintiff below to the answer of William Cackley.

We recommend an affirmance of the judgment.

By the Court: It is so ordered.

All the Justices concurring.

*Per Curiam:* The facts being the same in the case of WILLIAM CACKLEY v. DAVID S. PARRY *et al.* as in *Cackley v. Smith*, just decided, this case is affirmed, upon the authority of that case.

---

J. R. BELL *et al.* v. J. W. LONG *et al.*

VENDOR AND VENDEE—*Real-Estate Contract, Construed—Time, not of its Essence.* L. and T. sold certain real estate to B. and others, and gave to B. a bond to convey the title to B. upon certain terms and conditions. The full purchase-price of the property as shown by the bond was as follows: "\$7,000, to be paid as follows: \$1,000 cash in hand, and one note for \$1,000, due in 30 days from date hereof; and one note for \$2,500, due on or before six months from the date hereof; and one note for \$2,500 due on or before 12 months from date hereof;" and the bond provides as follows: "If said parties of the first part [the vendors] shall, on or before the 15th day of August, 1887, and upon full payment of said sum and sums of money, execute and deliver "a deed of conveyance for the property to B., then the bond shall be void," etc. The above "sums of money," except about \$375.75 thereof, due on the last note, were paid, substantially, but not strictly as to time, in accordance with the terms of the contract, and L. and T. on their part, on or about February 15, 1888, executed deeds of conveyance for all the property, and all the deeds were accepted except one for a small portion of the property; and the vendees failed and refused to accept that deed or to pay the remainder of the purchase-price due for the property. *Held,* That time was not of the essence of the contract on either side, and that L. and T. may maintain the action for the remainder due on the last note given by B. and others.

*Error from Rice District Court.*

THE facts sufficiently appear in the opinion.

*A. M. Lasley*, for plaintiffs in error.

*Jones & Jones*, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought in the district court of Rice county, on July 31, 1888, by J. W. Long and H. C. Taylor, partners as Long & Taylor, against J. R. Bell, A. M. Lasley, W. H. Carey, N. L. Grimes; C. H. Everest, J. H. Everest, J. E. Gilmore, and E. J. Loop, to recover a balance of \$375.75, alleged to be due on a certain promissory note, and to foreclose all rights which the defendants might claim to certain real estate under a certain title bond. The aforesaid promissory note was given by the defendants to the plaintiffs upon a real-estate contract, whereby the plaintiffs sold to the defendants and agreed to convey to one of them, to wit, J. R. Bell, certain real estate described in the aforesaid bond given by the plaintiffs to Bell. The aforesaid promissory note, with the indorsements thereon, reads as follows:

"\$2,500.

LYONS, KAS., February 15, 1887.

"On or before one year after date, we, or either of us, promise to pay to the order of Long & Taylor \$2,500, at the First National Bank, of Lyons, Kas., value received, with interest at 10 per cent. per annum.

J. R. BELL.

A. M. LASLEY.

WM. H. CAREY.

N. L. GRIMES.

C. H. EVEREST.

J. H. EVEREST.

J. E. GILMORE.

E. J. LOOP."

On the back of said note are the following credits:

February 15, 1888, paid by W. H. Carey .....	\$555 00
February 16, 1888, paid by Everest Bros.....	550 80
February 16, 1888, paid by J. R. Bell.....	275 20
February 17, 1888, paid by J. E. Gilmore.....	550 40
February 18, 1888, paid by McCash .....	275 20

The aforesaid bond reads as follows:

"Know all men by these presents, that Long & Taylor, of Rice county, in the state of Kansas, of the first part, are held and firmly bound unto J. R. Bell, of Rice county, in the state of Kansas, of the second part, in the sum of \$14,000.

"The condition of this obligation is such, that said parties

---

Opinion of the Court.

---

of the first part have agreed to grant, sell and convey unto said parties of the second part the following-described real estate, situated in Rice county and state of Kansas, to wit: Lots numbered 16, 18, 20, 22, and 24, in block No. 6, in White's addition to the city of Lyons, as shown by the recorded plat thereof, for the sum of \$7,000, to be paid as follows: \$1,000 cash in hand, and one note for \$1,000 due in 30 days from date hereof, and one note for \$2,500 due on or before six months from the date hereof, and one note for \$2,500 due on or before 12 months from date hereof.

"Now, if said parties of the first part shall, on or before the 15th day of August, 1887, and upon full payment of said sum and sums of money, execute and deliver to said part... of the second part a good and sufficient warranty deed, conveying an absolute and indefeasible estate in fee-simple, with the usual covenants, in and to said tract and parcel of land, then this obligation shall be void; otherwise, to remain in full force and effect.

"IN WITNESS WHEREOF, The said parties of the first part have hereunto set their hands, this 15th day of February, 1887.  
LONG & TAYLOR."

It appears that the following words and figures in the above bond after the word "now," to wit, "15th," "August," and "87," were written in the bond, while the other words and figures in that clause were printed. Various proceedings were had in the case prior to the trial, which proceedings will be further noticed hereafter; and finally, and on January 21, 1889, a trial was had before the court without a jury, and the court found generally, and rendered judgment in favor of the plaintiffs and against the defendants for the sum of \$592.98, the amount with interest still remaining due and unpaid on the promissory note sued on; and also ordered that said lot 22 be sold to satisfy the money judgment; and the defendants, as plaintiffs in error, bring the case to this court for review.

It would seem that the whole of the purchase-price for the property described in the bond, except that portion of such purchase-price still remaining due and unpaid on the promissory note sued on, was paid substantially, but not strictly as to time, in accordance with the terms of the original contract; and Long & Taylor on their part, on or about February 15,

---

Bell v. Long.

---

1888, executed deeds for all such property; and all the deeds except a deed for lot number 22 were accepted. In accordance with the instructions of J. R. Bell, that deed was executed to A. M. Lasley, and deposited with the First National Bank of Lyons, to be delivered to Lasley whenever the remainder of the purchase-price for the property should be paid. Lasley had notice; but neither he nor any other of the defendants ever paid such remainder.

The principal ground of error now urged by the plaintiffs in error, defendants below, is, that the court below misconstrued the terms of the aforesaid bond, and for that reason erred in all its rulings. They claim that, under the terms of the bond and the facts of this case, the whole of the purchase-price for the property, to wit, "said sum and sums of money" as mentioned in the bond, was in fact paid at the time of the execution of the bond simply by the payment of the \$1,000 in cash, and the delivery of the promissory notes mentioned in the bond; and that, without anything further being done by the defendants after the delivery of such notes, the plaintiffs were bound to execute and deliver, on or before August 15, 1887, a good and sufficient warranty deed for the property to Bell, the obligee; and that by failing so to do at that time they forfeited every right which they otherwise would have had. And the defendants further claim, that if the foregoing claim is not correct, then that the plaintiffs were bound to execute and deliver a good and sufficient warranty deed for the property to Bell, the obligee, on or before August 15, 1887, whether the last note, to come due on February 15, 1888, should ever be paid or not. The note that was to become due on or before August 15, 1887, and did so become due, was not paid until after August 15, 1887, and not until August 26, 1887. The decision of the court below was upon the theory that the plaintiffs were not bound to execute or deliver any deed for any of the property until full payment of the purchase-price for the property should be made.

We think the decision of the court below is correct. Under the terms of the bond, the deed was to be executed to Bell "on

---

Opinion of the Court.

---

or before the 15th day of August, A. D. 1887, *and upon full payment of said sum and sums of money.*" It was to be executed only "upon full payment of said sum and sums of money," and no deed was required to be executed or any conveyance made upon the delivery wholly or partly of promissory notes. It was the "full payment" of "money" that the parties had in contemplation. "Said sum and sums of money," as mentioned in the bond, were as follows: First, the \$7,000, the full purchase-price of the property, including all the other sums; second, the \$1,000 cash; third, the \$1,000 represented by the note due in 30 days; fourth, the \$2,500 represented by the note "due on or before six months;" fifth, the \$2,500 represented by the note "due on or before 12 months," which was the last note to become due, and the one sued on. The last two notes mentioned in the bond were upon their faces to become due as follows: The first one was to become due "on or before six months after date," which would be on or before August 15, 1887; and the last one was to become due "on or before one year after date," which would be on or before February 15, 1888; hence, with reference to these two notes, the defendants had the right to pay them both at any time after their execution, which was on February 15, 1887; (Teid., Com. Paper, §25a, and cases there cited;) and by paying them with the other sums at any time "on or before the 15th day of August, 1887," they had the right under the provisions of the bond to require the plaintiffs at the time of such "full payment" to execute a deed for the property to the obligee of the bond. Of course they were not required to pay either note until the last day mentioned in the note for payment. In other words, they had the right to pay these notes immediately, or to defer payment thereon as follows: On the next to the last note until August 15, 1887, and on the last note until February 15, 1888; and time was not of the essence of the contract in any case nor on either side. The defendants would not forfeit any of their rights by failing, as they did fail, to pay their notes strictly at the time when they became due; nor would the plaintiffs forfeit their rights by failing to



---

Cross v. Hollister.

---

execute a deed or deeds for the property strictly at the time when they might first be under obligation to execute such deed or deeds. This was certainly the view the parties took of the contract. The money in fact was not paid strictly at the time when it became due, and it does not appear that anyone, prior to the commencement of this suit, ever supposed that a deed for the property or for any part thereof would be executed until the purchase-money should be paid.

We think we have now disposed of all the substantial questions in this case. These questions were raised by various proceedings had before the trial, by exceptions taken during the trial, and by a motion for a new trial after the trial; and after carefully considering all the proceedings in the case and all the assignments of error, we are of the opinion that no material error was committed.

The judgment of the court below will therefore be affirmed.

All the Justices concurring.

---

#### A. W. CROSS V. SAMUEL HOLLISTER.

1. *NOTE—Assignment—Indorsement of Payment—Liability of Maker.* Where C., a stranger to a promissory note, takes the same from H., one of two makers, with an indorsement plainly written thereon: "Paid by H., this September 5, 1882, [which is the date of maturity,] and transferred to C.," "Without recourse, H.," and there is no mistake or fraud in the transaction, H. is relieved from liability on the note to C. or to his assignee.
2. *PAROL EVIDENCE, Inadmissible.* In an action on such a note, so indorsed, and where there is no fraud or mistake in the transfer, parol proof contradicting the indorsement, or which would change it from a conditional to an unconditional transfer, is not admissible.

#### *Error from Atchison District Court.*

ACTION to recover upon a promissory note. Judgment for defendant, *Hollister*, at the April term, 1888. The plaintiff, *Cross*, comes here. The opinion states the facts.

*Grant W. Harrington, and W. D. Webb, for plaintiff in error.*

*W. W. & W. F. Guthrie, for defendant in error.*

The opinion of the court was delivered by

JOHNSTON, J.: This was an action brought by A. W. Cross against George W. Howe and Samuel Hollister, to recover upon a promissory note made by Howe and Hollister, September 12, 1881, for \$750, payable to the order of Francis L. Howe, one year after date, with interest at 7 per cent. per annum. On the back of the note were the following indorsements: "Francis L. Howe." "Paid by Samuel Hollister this September 15, 1882, and transferred to P. D. Cheney." "Without recourse, Samuel Hollister." "P. D. Cheney." The plaintiff alleged that he was the owner and holder of the note, and that the indorsement on the note, "Paid by Samuel Hollister this September 15, 1882, and transferred to P. D. Cheney," is untrue, except as to the words "transferred to P. D. Cheney;" and that the indorsement "Without recourse, Samuel Hollister," was made thereon without any part of the note being paid by Hollister. It was further alleged that the money paid by Hollister to Francis L. Howe was for the purchase of the note, and was the money of P. D. Cheney. No service appears to have been obtained upon Howe, and the action proceeded against Hollister alone, who, in his separate answer, denied the allegations of plaintiff with respect to the indorsement, and alleged substantially that the note was paid off by him and the indorsement was placed upon the note by B. P. Waggener, the agent of Cheney, and that Cheney had accepted and retained the note so indorsed, and had discharged and released the defendant from any liability upon the note. He further alleged that he signed the note as surety, and for the accommodation of George W. Howe and P. D. Cheney, and at the instance of and as a substitute for Cheney; and that at the maturity of the note, with the money furnished to him, the defendant paid off the note sued upon, and transferred the

same to P. D. Cheney as evidence of indebtedness to be held against George W. Howe, who had absconded.

A trial was had before the court and a jury, and the testimony of the plaintiff, Cross, was introduced, to the effect that the note had been transferred from Cheney to him in 1886. Cheney testified that he pledged the note to Cross in 1886, as security for a loan which had never been paid. He stated that he obtained the note from Hollister on September 15, 1882, and that Waggener paid the money for Cheney and sent the note to him at Jerseyville, Ill. He further testified that neither Howe nor Hollister had ever paid him anything upon the note, and that he did not accept it as having been paid by Hollister. This is substantially all the testimony presented to sustain the action, and the court, upon a demurrer, held the evidence to be insufficient and took the case from the jury.

We think the testimony of plaintiff failed to establish a right of recovery against Hollister. He accepted the note with a qualified or restricted indorsement, which clearly discharged Hollister from any liability thereon. Hollister was one of the makers of the note, and, according to the indorsement, he paid it off at maturity and obtained possession of the same. Whether he was in fact a surety, or had signed it at the instance and as a substitute for Cheney, as alleged, and transferred it to him as a liability against Howe, is unimportant. Cheney accepted the note upon the written condition that Hollister should not be held liable thereon. The testimony of Cheney in effect is, that Waggener was his agent to pay the money and obtain the note. The ordinary presumption would be that a payment by one of the makers was an extinguishment of the obligation; but probably the relations of the parties were such that Cheney desired to retain it as an obligation against Howe, the first signer and maker of the note. At any rate, Hollister did not permit the note to pass out of his hands until there was written thereon a plain declaration discharging him from liability; and it is alleged that this indorsement was written on the note by the agent of Cheney. It was accepted without complaint and held by Cheney for a period of about

four years, when he transferred it to Cross, and no action was brought against Hollister for about five years after he had paid and transferred the same to Cheney. When Cross took the note it still contained, in clear and distinct terms, an unequivocal release of Hollister. It is not shown that any misrepresentation was made when the indorsement was written, nor that there was any fraud or mistake in the transaction between Cheney and Hollister. Neither Cheney nor Cross could read the note understandingly without seeing that no recourse could be had against Hollister, and that the only liability transferred, if any, was against Howe. There being no fraud or mistake, parol proof contradicting the indorsement, or which would change it from a conditional to an unconditional transfer, was not admissible. (*Doolittle v. Ferry*, 20 Kas. 234.) The only proof excluded, however, was the statement by Cheney that he "accepted the note from Hollister as an obligation against the makers, according to its legal meaning and effect." This was a vague and meaningless statement, and was properly excluded from the jury. What was the legal meaning and effect of the note and indorsements? was the question submitted for the determination of the court, and Cheney's opinion of their legal effect was of no consequence. He accepted and retained the note with an indorsement which expressly provided that Hollister should not be held liable, and there is nothing in the testimony showing that he was not aware of the indorsement, or that any deceit or fraud was practiced upon either his agent or himself.

It is further contended that, although Hollister has paid the note, the fact that he had transferred it and put it out upon the world makes it a new obligation, and estops him from alleging payment in his own defense. There is nothing in the testimony to show or that would warrant an implication that Hollister intended to issue the note as a new obligation based on a new consideration. The idea that he issued it as a new obligation against himself, and that he warranted it as the legal obligation of both the makers, is excluded by the plain language of the indorsement written upon the note at the

---

Tracy v. Kerr.

---

time of the transfer. The written agreement of the parties overcomes any of the presumptions invoked by the plaintiff. Whatever may be his rights against Howe, who is not defending, it is clear that he has shown no right of recovery against Hollister.

The judgment of the district court will be affirmed.

All the Justices concurring.

---

PAT. TRACY V. J. M. KERR.

**MECHANICS' LIENS**—*Action by Subcontractors—Parties—Counterclaim by Owner.* Under § 4738, (mechanics' liens,) General Statutes of 1889, a subcontractor or other person who brings an action against the owner of a building for materials used in its construction must make the original contractor a party, and if the subcontractor or other person fails or refuses to do so, and the contractor has notice or knowledge of the pendency of the action and fails to defend the maker against such demand, the owner may defend at the cost and expense of the contractor. If the contractor is not shown to have notice or knowledge of the pendency of the action, the owner has a cause of action against the subcontractor or other person for damages by reason of the wrongful institution of the action, because of the failure to make the contractor a party. When the contractor assigns all the money due on a building contract to a lumberman who had furnished material, and who had primarily brought suit without making the contractor a party, the owner can plead such cause of action as a counterclaim.

*Error from Chase District Court.*

THE material facts are stated in the opinion. Judgment for plaintiff, *Kerr*, at the February term, 1889. The defendant, *Tracy*, comes here.

*Madden Bros.*, for plaintiff in error.

*John V. Sanders*, for defendant in error.

Opinion by SIMPSON, C.: Prior to the commencement of this action Tracy had contracted in writing with one Connacher, a builder, to erect a house. Kerr was a dealer in lumber and building materials, from whom materials were purchased that were used in the construction of Tracy's house. Kerr brought an action against Tracy and wife to recover the value of the materials sold, alleging in his petition that Tracy's agent, Connacher, had bought the material for Tracy, and that as the material was furnished, it was at that time charged directly to Tracy; that the material furnished was of the value of \$222.99. Tracy in his answer alleged, as a first defense, that Kerr had commenced his action within the period of sixty days after the completion of the building; for a second defense, denied every material allegation of the petition except the completion of the building on the 10th day of November, 1887; for a third defense, Tracy and wife specifically denied that Connacher had any authority from them to contract for or purchase any lumber, or that he was the agent of Tracy and wife, or either one of them, for any such purpose. The reply of Kerr was a general denial. The case was tried by a jury, and a verdict in favor of Kerr for \$4.70 was returned, and a judgment rendered. After this judgment was rendered, and on the 13th day of December, 1888, Connacher made a written assignment of all the indebtedness of every kind and nature owing to him from Tracy, growing out of the building contract, to Kerr, and on the 14th day of December Kerr brought this suit, alleging in his petition, as a first cause of action, that Connacher had duly performed all of the conditions of the agreement on his part, and that there remained due and unpaid on said building contract the sum of \$242,—and asking judgment for that amount; as a second cause of action, extra work of the value of \$10 done by Connacher, at the request of Tracy, with a demand for judgment for that amount. Tracy answered, first, pleading the former suit and judgment between the same parties, claiming that it was for the same debt—that the same identical lumber and building material

---

Tracy v. Kerr.

---

was in controversy as in the first action; second, denied generally; third, that he had paid Connacher, plaintiff's assignor, before the assignment, money, property, and on orders drawn by Connacher on this defendant, the sum of \$325; fourth, that Connacher did not perform in accordance with the building contract in many particulars; that he (Tracy) was compelled, by reason of the failure of Connacher to perform, to hire men, buy materials, and complete the building himself, at a cost of \$200; fifth, that the plaintiff wrongfully commenced a suit against him as a contractor to foreclose a mechanic's lien, alleging that Tracy had bought lumber and material from the plaintiff with which to construct said building, when in truth and in fact Connacher had bought it, and the plaintiff ought to have commenced his suit as a subcontractor, and made Connacher a party, so that Connacher would be obliged to bear the expense of said litigation; that prior to said suit this defendant informed plaintiff of all the facts, and requested him to make Connacher a party, but he refused to do so, and prosecuted the suit to final judgment without making Connacher a party, by reason of which this defendant was prevented from having Connacher defend said litigation and bear the costs and expenses of the same, to the damage of this defendant of \$50. Attached to the answer is the record of the action of Kerr v. Tracy and wife. The plaintiff below filed a motion requiring the defendant to make his third and fourth defenses more definite and certain. The plaintiff below filed a demurrer to the first, third and fifth defenses, on the ground that they nor either of them did not state facts sufficient to constitute a defense to the facts stated in the petition. The trial court sustained the demurrer to the first, third and fourth defenses set forth in the answer of the defendant. And the defendant not amending them in any way, but excepting to the ruling, the cause was tried by a jury, after the plaintiff had filed a general denial to the remaining defenses pleaded in the answer. The jury returned a general verdict in favor of Kerr for \$177.80, and Tracy brings the case here for review.

The substantial complaint of the plaintiff in error is, that

---

Opinion of the Court.

---

the court sustained the demurrer to the first and fifth defenses. It is now insisted that by the ruling on the demurrer to the first defense the trial court has permitted Kerr to have a double recovery against Tracy, as both suits between these parties were about the same subject-matter—the lumber and materials that were used in the construction of the house. In the first suit, it is said that the legal effect of the allegations in the petition is that he had furnished the lumber and material under a contract with Tracy, and in the second, that Connacher furnished the lumber and material, and the plaintiff is his assignee.

I. Whatever may be the allegations of the first defense set forth in the answer of Tracy, it is apparent, on the state of facts heretofore recited, that the cause of action set forth in the petition of Kerr in this action was not in existence, so far as Kerr is concerned, at the time of the trial and final determination of the first action. The issue made by the pleadings in the first case was, whether Tracy was indebted to Kerr on account for lumber sold by Kerr to Tracy personally, or to his duly-authorized agent, Connacher. The issue made by the pleadings in this case is the amount due from Tracy to Connacher on the building contract. This issue could not have been tried in the first case, because at the time that suit was instituted and tried Kerr had no interest in the building contract, and had never been a party thereto, and Connacher was not made a party in that action. The question raised by the plea of *res adjudicata* is, whether or not the same subject-matter between these parties was drawn in question or included in the issue, so that it could be, or was, as a matter of fact, tried and determined by the judgment in the former action in which the same persons were parties. (*Shepard v. Stockham*, 45 Kas. 244.) This action is brought by Kerr against Tracy to recover the amount still remaining due and unpaid on the building contract, Kerr having succeeded to the rights of Connacher by an assignment made after the final determination of the first action. It is beyond dispute that the issues in the two cases are entirely separate and distinct, and that the one was



not and could not be included in the other. We think the ruling of the trial court in sustaining a demurrer to the first defense in the answer of the plaintiff in error was good, as it failed to state any defense to the action.

II. As to the demurrer to the fifth defense, this defense was based upon this state of facts disclosed by the record of the first action: Kerr commenced an action against Tracy to recover a judgment for an amount of material furnished for the construction of the building erected by Connacher, alleging that, under contract with one D. S. Connacher, contractor and builder, and agent of the said Pat. Tracy, Kerr furnished said Tracy lumber and material for the erection of a dwelling-house; that Kerr treated this as a direct sale to Tracy, and as the lumber and material was delivered Kerr charged the same directly to Tracy on his books, and so informed Tracy during the delivery of the materials. He had filed, and in his petition set up and claimed, a mechanic's lien on the building and the ground upon which it was situate, and sought to foreclose it in the action. It seems from the record that he only recovered a personal judgment for a small amount, the record nowhere showing what disposition was made of the lien. The plaintiff in error, however, claims that Kerr wrongfully commenced the first action as a contractor to foreclose a mechanic's lien against Tracy, when he ought to have commenced his suit as a subcontractor, and made the contractor, Connacher, a party, so that Connacher would be obliged to bear the expenses of said litigation; that Kerr was informed of all the facts before the commencement of his said first action, and was requested to make Connacher a party to the said suit, but refused and failed to do so, and compelled Tracy to assume the expense and pay the costs of said litigation, and employ and pay an attorney, and that by reason thereof Tracy was damaged in the sum of \$75. This contention is based upon ¶ 4738, General Statutes of 1889, which provides:

“Where such action is brought by a subcontractor, or other person not the original contractor, such original contractor shall be made a party defendant, and shall at his own expense

---

Opinion of the Court.

---

defend against the claim of every subcontractor, or other person claiming a lien under this act; and, if he fails to make such defense, the owner may make the same at the expense of such contractor; and until all such claims, costs and expenses are finally adjudicated and defeated, or satisfied, the owner shall be entitled to retain from the contractor the amount thereof, and such costs and expenses as he may be required to pay."

In view of the provisions of this section, it practically makes no difference whether we consider Kerr technically as a subcontractor, or one of "the other persons claiming a lien under this act," for the language is so plain, the command that the contractor be made a party so imperative, that requirement is so mandatory, and the result of a failure or refusal to make him a party is so specifically stated, that there seems to be no fair ground, either by construction or otherwise, on which to place approval of the ruling of the trial court. The provision in question is a just and equitable one for the owner of the building. He ought not to be required to litigate at his own expense all the differences that naturally and inevitably arise between the contractor and the men who furnish material to him, and those who are hired by the contractor to perform labor on the building. This provision was designed to relieve him from the trouble and expense of a litigation in which he has practically no interest. This provision, and the one that the owner shall not become liable to any claimant for any greater amount than he agreed to pay the original contractor, are designed for the protection of the owner of the land and building, and are deserving of such liberal interpretation as will best accomplish the intent of the legislature. It may be suggested that if the subcontractor, or other person not the original contractor, neglect or refuse to make the contractor a party, the owner may do so on his own motion, and while it is probably true that the trial court would permit or order this to be done, yet the plain command of the statute is, that the contractor shall be made a party, and we think it is primarily the duty of the party instituting such an action to do so. In this case Kerr was requested so to do and

---

Tracy v. Kerr.

---

refused, and Tracy was compelled to assume the burden and to pay the expenses of a litigation that the legislature casts upon the contractor. He now seeks to recover the costs and expenses of such litigation from the assignee of the contractor. We think he cannot do this, for the evident reason that there is no showing in the record that Connacher ever had notice or knowledge of the pendency of the original action; but he has a cause of action against Kerr personally for the recovery of the costs and expenses necessarily incurred by him because of Kerr's wrongful institution of that action. We are aware that this may prove to be a troublesome construction of the statute, as in every instance the subcontractor or "other person" may refuse to make the contractor a party, but for this refusal or neglect several remedies may be suggested. It might be that, if the subcontractor failed to make the contractor a party, there would be a defect of parties defendant, or the owner might serve a notice on the contractor similar to that served by the grantor on his grantee in actions for damages occasioned by a breach of the covenants of warranty in a deed to real property. These are suggestions, rather than authoritative declarations, but as this record nowhere shows that Connacher had notice or knowledge of the pendency of the original action, we think the defense was not good in this respect, because no statutory liability was shown. Tracy unquestionably has a cause of action against Kerr personally for the recovery of his costs and expenses necessarily incurred by reason of Kerr's wrongful institution of that action; but can Tracy plead it and recover in this action? This is a vexed question. If Tracy can recover the costs and expenses of the former litigation in this action, it must be by waiving the tort and suing on the implied promise. Can it be joined with the other defenses pleaded as a counterclaim? It is a claim existing in favor of Tracy against Kerr, between whom a several judgment might be rendered in an action; that is, Tracy could bring an independent action against Kerr to recover the costs and expenses of the first suit. It arises out of the contract now sued upon by Kerr, and is connected with the subject of

---

Insurance Co. v. Laggart.

---

the action. According to the authorities cited in the case of *Deford v. Hutchison*, 45 Kas. 318, 332, although they were not authoritatively applied in that case, (see opinion on motion for rehearing,) we think that the defense stated facts sufficient to constitute a counterclaim, and that the court erred in sustaining a demurrer thereto. We recommend that the judgment be reversed, with instructions to overrule the demurrer to the fifth defense.

By the Court: It is so ordered.

All the Justices concurring.

---

THE GERMAN FIRE INSURANCE COMPANY V. DORA  
LAGGART.

1. **ACTION on Insurance Policy—Evidence for Jury.** In an action upon an insurance policy for loss by fire, where it appeared that an application had been received by the company, and the party making the same had possession of a policy of insurance in the company to which application had been made, and for which a note for the premium had been executed to such company, *held*, that there was evidence sufficient to go to the jury, and that this court cannot say there was a failure of proof showing that the insurer had executed and delivered a policy to the insured.
2. **EVIDENCE—No Error.** The evidence examined, and found that no prejudicial error was committed by the trial court in the admission of the same.

*Error from Sedgwick Court of Common Pleas.*

THE opinion states the facts. Judgment for plaintiff, *Laggart*, at the May term, 1889. The defendant *Company* brings error.

*John E. Hume*, for plaintiff in error.

*John D. Davis*, for defendant in error.

Opinion by GREEN, C.: This was an action upon an insurance policy for the sum of \$800, claimed to have been issued by the German Fire Insurance Company on the 10th day of June, 1887, for one year, upon a two-story frame house, 18x40 feet, with an addition 16x24 feet, one story high, in St. Marks, Sedgwick county. It was alleged that the property was totally destroyed by fire on the 30th day of July, 1887, and that the proof of loss was furnished within 60 days. A blank copy of the policy and the application for the insurance were attached to and made a part of the petition. The defendant answered, admitting the execution and delivery of the application for the insurance, which was made a part of the answer; and further alleged that the same was taken by an agent for the plaintiff; that before it was accepted, and before any premium had been paid, a fire broke out on the premises and destroyed the house described in such application. The answer was verified. The plaintiff filed a verified reply. The case was tried before the common pleas court of Sedgwick county and a jury, and a verdict was returned in favor of the plaintiff for the sum of \$901.43. The insurance company brings the case here, and it is urged, first, that there was a total failure of proof establishing the fact that the company executed and delivered a policy of insurance to the plaintiff below; second, that the court permitted incompetent and prejudicial evidence to go to the jury; third, that the trial court should have sustained the motion of the insurance company directing a verdict for the defendant. Substantially the same questions are raised by the first and last assignments of error, and we shall consider them together.

The insurance company admitted, in its answer, that an agent of the plaintiff had presented an application for insurance on the property described in her petition to the agent of the company, but alleged that the application had never been accepted, and that no premium had been paid thereon. The evidence established the fact that a policy of insurance was delivered, but it is not clear by whom. The evidence

---

Opinion of the Court.

---

shows, however, that it was a policy of the plaintiff in error. The insured gave a note for the premium, which was made payable to the German Insurance Company, and which was unpaid at the time the loss occurred. It seems there was a notice sent out in regard to this note, but the record is silent as to its contents. It is urged by counsel that because the evidence did not establish the fact that the policy was countersigned by the agent at Fort Scott, and that the policy itself showed that such an attestation was necessary to make the policy valid, therefore there was no evidence showing that the company had ever executed and delivered a policy of insurance to the insured. To support this position, our attention is called to several authorities which, it is contended, support this position. The first is the case of *Hardie v. Insurance Co.*, 26 La. Ann. 242. In that case the policy had never been countersigned or delivered, and the premium had not been paid. In the case of *McCully v. Insurance Co.*, 18 W. Va. 782, the policy had never been delivered or countersigned. The court said, in the case of *Insurance Co. v. Walser*, 22 Ind. 83:

“It would seem that, to a complete execution of the policy, it was necessary that it should be signed by the president and secretary of the company, and countersigned by the agent. The policy in question is not signed by the president and secretary. It is only signed by the agent.”

In the case of *Lynn v. Burgoyne*, 13 B. Mon. 400, a policy was issued by a clerk of the company, and it was held that it was not a valid policy because it was not countersigned. The cases cited do not sustain the position of the plaintiff in error. The supreme court of Michigan has held that where there has been a delivery of a policy by an agent, or a renewal receipt with his name written upon it as a completed instrument, neither he nor the company can afterward object that it was not countersigned by him. (*Insurance Co. v. O'Conner*, 29 Mich. 241; *Insurance Co. v. Earle*, 33 id. 143.)

There was some evidence to establish the fact that the insured had a policy of insurance. The plaintiff below testified

---

Insurance Co. v. Laggart.

---

that her husband gave her a policy, and she put it away in a box and it was burned with the building. It has been said:

"The mere manual possession of the policy is of little consequence, whether it be in the hands of the insurers or the insured. Its possession by the insured makes a *prima facie* case for him, subject to be met by proof that it was never delivered with the consent of the insurers; while its possession by the insurers makes a *prima facie* case for them, subject to be met by proof that, though not transferred, it was intended by the parties to be a valid contract without further action by either party, and so in legal contemplation there was a delivery." (May, Ins., §56.)

It was admitted by the pleadings that the insurance company had an application from the plaintiff below; and it was established that she executed a note signed by herself and husband to the company for the premium upon the policy. We think this admission in the answer, the giving of the premium note and the possession of the policy, showed a *prima facie* case in favor of the plaintiff in the common pleas court. There was, at least, evidence sufficient to submit the facts to the jury; and we cannot say that there was an entire failure of proof that the insurance company had executed and delivered a policy, or that the court erred in refusing to sustain the motion of the company for verdict in its favor. There was no evidence offered upon the part of the company in the court below.

It is insisted that the court erred in permitting the husband of the plaintiff below to testify in regard to a certain notice claimed to have been received from the company in regard to the premium note. We do not think this was material error. The witness did not know the contents of the notice. If the matter of the notice had been eliminated from the case, still we think there would be sufficient evidence to make out a *prima facie* case. The evidence remained that a note had been executed to the company; besides there was some evidence to show that the husband had been acting for the wife in effecting the insurance.

We recommend an affirmance of the judgment.

By the Court: It is so ordered.

All the Justices concurring.

## D. M. OSBORNE &amp; Co. v. R. W. SCHOONMAKER.

47 667  
72 150

1. **CONSTRUCTION OF DEED**—*Agreement to Reconvey.* S. and wife executed an instrument in the form of a warranty deed, for the conveyance of land to B., C., and B. At the time B., C. and B. entered into an agreement with S. and wife to reconvey the land described in said deed to S. and wife at the end of a year, upon the payment by S. and wife of a sum of money therein named to B., C., and B., with a stipulation that S. and wife are to occupy the land in the meantime as tenants of B., C. and B. under the deed. S. and wife did not pay, but surrendered the premises to B., C., and B. *Held,* That in view of the treatment accorded said instruments by the parties, they constituted a deed from S. and wife to B., C., and B., and a contract to reconvey from B., C. and B. to S. and wife, upon the payment of the sum of money named in said contract by S. and wife to B., C., and B.
2. **EVIDENCE, Sustains Finding.** The record in this case examined, and *held,* that it discloses evidence to sustain the finding of the district court, and therefore this court will not reverse the action of said court.

*Error from Crawford District Court.*

PROCEEDING by D. M. Osborne & Co. against Schoonmaker, to enforce an execution sale of land. From an order, at the January term, 1889, setting aside the sale, the plaintiffs bring error.

*Wells & Wells,* for plaintiffs in error.

*James Brown,* for defendant in error.

Opinion by STRANG, C.: In 1873, R. W. Schoonmaker purchased the southeast quarter of section 11, township 29, range 23, Crawford county Kansas, and, with his family, resided thereon until March, 1884. He then moved off the premises, and was away during the years 1884 and 1885. He went back to the premises in March, 1886, but left again in May following, moving upon and cultivating another farm in the neighborhood owned by one Reed during the year 1886. In the spring of 1887, he returned to the farm with his family, as the tenants of Brown and Bell, he and his son paying Brown and Bell the sum of \$200 rent for the place that year. The



---

Osborne v. Schoonmaker.

---

1st of February of the following year, 1888, he and the family again left the farm, surrendering possession to Brown and Bell. The farm was occupied by M. P. and R. G. Crawford, who farmed it during the year 1884, and by one Jenkins, who cultivated it during the years 1885 and 1886, and who was on the farm occupying and cultivating it during the time Schoonmaker and wife were on the farm in the spring of 1886. April 5, 1886, while on the farm, Schoonmaker and wife executed a deed, in form an absolute warranty deed, for the premises to Brown, Crawford, and Bell. At the time of the execution of this deed, and as a part of the same transaction, a written agreement was entered into between Brown, Crawford and Bell of the first part, and R. W. Schoonmaker and Ann Schoonmaker of the second part, reciting the making of the deed by Schoonmaker and wife to said Brown, Crawford, and Bell, and providing for a reconveyance of said land by Brown, Crawford and Bell to Schoonmaker and wife, in a year from such time, upon the payment by said Schoonmaker and wife to Brown, Crawford and Bell of a certain amount of money owing by said Schoonmaker and wife to said Brown, Crawford, and Bell. Said agreement also contained the following provisions:

"It is fully understood and agreed by said first parties, that if they fail to pay the said several sums of money to said second parties on or before the time stated above, to wit, April 1, 1887, then said second parties are entirely released from any and all obligations to convey said premises to said first parties, and time is the essence of this contract. And if said first parties make any default in any of the conditions of this agreement, then they will surrender the possession of said premises quietly and peaceably to said second parties, or their heirs or assigns. It is further understood and agreed, that until the 1st day of April, A. D. 1887, or until the payment of the several sums as stated, the said parties of the first part occupy said premises as the tenants of said second parties, and disclaim any other or further or different title or interest therein."

Schoonmaker and wife did not redeem, but surrendered to Brown, Crawford and Bell the possession of the premises

---

Opinion of the Court.

---

February 1, 1888. April 5, 1887, Crawford and wife deeded their interest in said land to Brown and Bell, who, on the 12th day of March, 1888, sold and conveyed said land to John N. Getter. July 22, 1879, D. M. Osborne & Co. recovered a judgment against R. W. Schoonmaker, before a justice of the peace of Crawford county, for the sum of \$267.60. June 29, 1884, an execution was issued on said judgment, and returned "No property found." July 10, 1884, an abstract of said judgment was filed in the office of the clerk of the district court of Crawford county, and now remains on the records of said court unsatisfied. May 28, 1888, an execution was issued on said judgment by the clerk of the district court, directed to the sheriff of said county, who, for want of goods and chattels of the defendant therein, levied the same upon a portion of the land above described, which was appraised at \$500, and sold to D. M. Osborne & Co. for \$334. Afterward a motion to confirm the sale was filed, and also a motion by John N. Getter to set aside the sale. Over the objection of D. M. Osborne & Co., evidence was heard upon said last motion, and the court finally overruled the motion to confirm, and sustained the motion to set aside the sale, to which ruling D. M. Osborne & Co. excepted, and come here with their case-made and ask this court to reverse the ruling of the court below.

There are several questions raised in this case and discussed in the briefs of counsel, but we think the real question in the case is, whether or not the judgment of D. M. Osborne & Co. was a lien upon the southeast quarter of section 11, township 29 south, of range 23 east, in Crawford county, Kansas, when execution was issued upon said judgment and a part of said land was levied upon and sold in satisfaction thereof. Said land having formerly been the homestead of R. W. Schoonmaker and wife, and occupied as such for many years, the question as to whether or not said judgment was a lien upon said land involves, first, the character of the absence of Schoonmaker and wife from said land during the years 1884 and 1885 and a portion of the year 1886; and, second, the character of the instrument, in form a deed, executed and delivered by said

Schoonmaker and wife to Brown, Crawford and Bell April 5, 1886. We will consider the latter question first. It may be true that, as between Schoonmaker and wife and Brown, Crawford, and Bell, the former might have treated said deed and the contract accompanying it as an equitable mortgage, and thereunder paid the sum named in the said contract to Brown, Crawford, and Bell, and retained the land; but as the instrument made by them was in form a deed, and placed on record by Brown, Crawford, and Bell, and as, by the terms of the contract between them, Schoonmaker and wife were to surrender the possession of the premises to them upon failure to pay the sum named in said contract, and as Schoonmaker and wife did not pay said sum, but treated the instrument as a deed, and surrendered the possession of the premises thereunder to Brown, Crawford, and Bell, we think the instrument must be held to have been a deed, with a contract to reconvey upon payment of the sum therein named by Schoonmaker to Brown, Crawford, and Bell. If such instrument was a deed, then the judgment of D. M. Osborne & Co., to have become a lien upon said land, must have become a lien before the making and delivering of said deed, April 5, 1886. This involves the character of the absence of Schoonmaker and wife from said land prior to the making of the deed thereto to Brown, Crawford, and Bell.

A person may be absent from his homestead without abandoning it as such, and without losing his homestead right therein. It depends upon the character of his absence as to whether or not he loses his homestead right thereby. If a person leaves his homestead to acquire a residence elsewhere, he loses his homestead right by such absence. If, though absent from a homestead, a person still regards it as home, and intends to return thereto, he does not lose his homestead right therein. Did the Schoonmakers intend to abandon their homestead when they left it in 1884, or afterward, prior to their return in the spring of 1886, and the making of the deed to Brown, Crawford, and Bell? If they did, then the moment they left said homestead without intending to return,

---

Opinion of the Court.

---

or, being absent therefrom, formed an intention to remain away from said homestead, they lost their homestead right, and the judgment of D. M. Osborne & Co., being of record in the office of the clerk of the district court, would become a lien. Schoonmaker and wife both testify that, at the time of leaving their said homestead, it was their fixed and avowed intention to return thereto, and that during all the time of their absence therefrom they fully intended to return to their homestead, and that they did return thereto about the 1st of March, 1886, and were residing thereon and claiming said land as their homestead on the 5th day of April, 1886, the date of their deed to Brown, Crawford, and Bell. Several witnesses testified that they were acquainted with the Schoonmakers during their absence from their farm, and that they frequently heard them speak of the farm as their home, and of their intention to return thereto and reside thereon. Against this evidence rests the fact of the absence of said Schoonmakers from said premises during the years 1884, 1885, and part of the year 1886. We do not think the fact of such absence could overcome the evidence of the parties themselves, that they intended all the time to return to said land and occupy it as a homestead. But upon this question the court before which the proceedings were had found against the plaintiff in error, and, as the question was a disputed one, and the record contains evidence to sustain the finding of said court, this court cannot interfere.

It is therefore recommended that the judgment of the district court be affirmed.

By the Court: It is so ordered.

All the Justices concurring.

47 672  
52 797

## THE GREAT SPIRIT SPRINGS COMPANY V. THE CHICAGO LUMBER COMPANY.

1. *CROSS-PETITION—Answer—Amendment of Cross-Petition—Practice.* Where a cross petition sets up a mechanic's lien, and prays for a foreclosure of the same and a sale of the premises therein described, and an answer is filed containing, among other things, a general denial, and upon the trial the court permits the answer to be amended so as to allege the abandonment of work upon the building in the place of its completion, the answer on file will be regarded as putting in issue the amendment to the cross-petition; and therefore when the court and parties proceed with the trial as if the alleged abandonment was one of the issues of the case, the failure of the court to permit the filing of a new denial is not erroneous or prejudicial.
2. *MECHANIC'S LIEN—Timely Filing—Enforcement.* Where the foreclosure of a mechanic's lien is tried before the court without a jury, and the court finds as a fact that certain work was done upon the building upon a specific date, it will be assumed, in the absence of any showing to the contrary, that the work was done under the contract, or with the consent of the owner. In either case, the owner would be liable for the work done and material furnished, and the mechanic's lien, if filed within the statutory time after such work was done and material furnished, would be in time. (The case of *Shaw v. Stewart*, 48 Kas. 572, followed.)

*Error from Mitchell District Court.*

ACTION to enforce a mechanic's lien. The material facts appear in the opinion.

*Kelley & McNerney*, for plaintiff in error.

*J. W. Sheafor*, *C. H. Hawkins*, and *A. W. Hicks*, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: John H. Rodgers brought his action against the Great Spirit Springs Company, the Chicago Lumber Company, and others, to recover from the springs company the sum of \$1,696.24, with interest from the 25th day of December, 1884, for work, labor and material in constructing a stone hotel upon the southeast quarter of section No. 25, town-

ship 6, range 10, Mitchell county, in this state, and to have the amount adjudged a lien upon the premises, which were alleged to be owned by the Great Spirit Springs Company. The Chicago Lumber Company filed its separate answer and cross-petition, alleging that John H. Rodgers was indebted to it in the sum of \$1,688.61, with interest from the 30th day of June, 1884, for lumber and building material furnished and used in the construction of the hotel upon the premises described in the petition, and praying for judgment against plaintiff for said amount, and also for a foreclosure of a mechanic's lien filed on the 28th day of January, 1885. Subsequently, the Great Spirit Springs Company filed a reply to this answer and afterward amended the same. Trial was had before the court without a jury. Judgment was rendered in favor of the Chicago Lumber Company against John H. Rodgers in the sum of \$2,128.26, with interest at 7 per cent., and also costs, taxed at \$153.73. The trial court also decreed a foreclosure of the mechanic's lien filed by the Chicago Lumber Company upon the premises described in the petition, and owned by the Great Spirit Springs Company, for the amount of \$2,043.34, with interest and costs. The springs company brings the case here.

It is contended that the special findings and judgment of the trial court are not supported by the evidence. The record, as to the evidence, comes to us in an unsatisfactory condition. The only statement that all of the evidence introduced at the trial is preserved in the record is the recital of the trial judge in his certificate to the case-made. This is insufficient.

“Where a case is made and settled for the supreme court, and the party making it desires that it shall be shown that the case contains all the evidence introduced on the trial, a statement to that effect shall be inserted in the case itself, and not in the certificate of the judge who settles the case.” (*Eddy v. Weaver*, 37 Kas. 540; *Insurance Co. v. Hogue*, 41 id. 524.)

It is further contended that various errors occurred during the trial. These alleged errors cannot be reviewed, because no exception was taken to the overruling of the motion for a

new trial. If any errors occurred they were waived thereby. (*Lyons v. Bodenhamer*, 7 Kas. 472; *Nesbit v. Hines*, 17 id. 317; *City of Atchison v. Byrnes*, 22 id. 68.)

It is claimed that the court, after the Chicago Lumber Company had introduced its evidence and rested, allowed an amendment to its answer and cross-petition, so as to allege the abandonment of the work by Rodgers, instead of the completion of the hotel, as alleged in the original answer. The condition of the record about the amendments allowed to the various pleadings is also unsatisfactory. If, however, the amendment was allowed, as claimed, as the Great Spirit Springs Company filed a general denial to the answer or cross-petition of the lumber company, it does not seem that any amendment was necessary to put in issue the alleged abandonment of the work by Rodgers. The court and parties upon the trial seem to have fully tried this issue; therefore no prejudicial error appears.

Really the only matter before us for consideration, owing to the condition of the record presented, is, whether the judgment rendered in favor of the Chicago Lumber Company is supported by the pleadings framed by the parties. It is urged that the trial court made a great many findings of fact which were entirely unnecessary and immaterial and not within the issues of the case, but failed to make findings that were necessary in order that the lumber company could legally recover against the springs company, because the court did not specifically find that the last work on the hotel was done under the contract or within 60 days prior to the filing of the mechanic's lien of the lumber company. The court, however, made this finding:

"The hotel was never fully completed, and still remains in an unfinished state, unoccupied. In July or August, 1884, there was a cessation in the work of the plaintiff on the building, and no work was thereafter done by or for him on the building until the 25th day of December, 1884; nor after that date, at which time he put a hasp and fastening on the door which had previously been hung in the basement of the building, and locked the door with a padlock, nailed up two

## Opinion of the Court.

doors that opened on the first story above the basement with sheeting and boards and 2x4 pieces of lumber, and also with pieces at the bottom of the door. Whether he did any further work or labor on the building at that time does not satisfactorily appear from the evidence, and whether the hasps and fastenings on the basement door were in accordance with the plans and specifications does not appear, as the plans and specifications were not offered in evidence."

The contract of John H. Rodgers required him "to do all the carpenter work on the hotel, furnish all the wood material required by the plans and specifications, excepting the lath for plastering, furnish all hardware, nails, locks, bolts, hinges," etc. It must be assumed, in the absence of any showing to the contrary, that the work done by Rodgers on December 25, 1884, was done under his contract, or with the consent of the springs company, the owner of the hotel. In either case, the springs company would be liable for the work and materials, and therefore the mechanic's lien, under the finding, was filed within time. It was decided in *Shaw v. Stewart*, 43 Kas. 572, that —

"Where the abandonment of work upon a building is caused either by the consent or fault of the owner, the building is to be deemed completed for the purpose of filing a mechanic's lien. If a contractor permanently abandons his work upon a building before completing the same under his contract, the subcontractor may, if not inequitable, consider the building as completed for the purpose of filing a lien thereon."

Finally, it is contended that if the lumber company had a lien for materials furnished, it waived its right to enforce it by withdrawing the statement or lien from record. It appears that the lien was properly filed on January 28, 1885. The answer of the lumber company in this case was filed on the 24th day of December, 1885. To prepare the answer, Joel Holt, esq., one of the attorneys of the lumber company, took the lien and papers connected with it from the office of the district clerk. It was soon returned to the clerk, but was attached to the answer of the lumber company. As between the lumber company and the Great Spirit Springs Company,



Barlow v. Barlow.

we do not think that the withdrawing temporarily of the statement or lien, and returning it to the district court as filed with the papers in this case, a sufficient cause for holding the lien waived, or inoperative. If the rights of third parties had intervened, a very different question would be presented.

The judgment of the district court will be affirmed.

All the Justices concurring.

47	676
52	476
47	676
58	589

47	676
78	85

### FRANK F. BARLOW *et al.* v. ELIZABETH A. BARLOW.

**RESULTING TRUSTS—Homestead Purchased with Wife's Funds.** Where a husband and wife reside in another state, and she has a considerable amount of property and he has none, and he is nearly blind and they agree to come to Kansas and procure land which shall belong to her, and they come and settle upon a quarter-section of government land, intending to procure the title under the United States homestead laws, and the entry thereof is made in his name, but she furnishes all the money to pay the costs and expenses thereof, and to make all the improvements thereon, and valuable improvements are made thereon, and, when final proof is made it is made in his name, but still it is the intention and agreement of the parties that the property shall be hers, and he agrees to convey the title to her as soon as the patent shall be issued, she agreeing to furnish him a home thereon as long as he shall live, and they continue to reside upon the property, and she continues to make improvements thereon, and in a little more than one month after the final proof is made the husband dies intestate, and without executing to his wife any deed for the land, *held*, that under the facts of the case the wife is entitled to the property.

#### *Error from Mitchell District Court.*

THIS was an action brought in the district court of Mitchell county on September 1, 1885, by *Frank F. Barlow*, Ernest C. Barlow, Eldora A. Thompson, Fidelia C. Everett, Flo Ellen Viers, Huldah A. Frazier and Mattie A. Allen against Elizabeth A. Barlow and Harry P. Stimson, for the partition

---

Statement of the Case.

---

of the northwest quarter of section 16, in township 7 south, of range 7 west. The defendant *Elizabeth A. Barlow* answered, denying generally all the allegations of the plaintiffs' petition except such as she expressly admitted, and then by way of new matter alleged many facts, and asked that she be decreed to be the absolute owner of the property in controversy; that the defendants be decreed to specifically perform a certain contract set forth in her answer; that they be barred from all claim, demand or interest in and to the property, and for such other and further relief as might be proper. The plaintiffs replied to this answer, denying generally all the allegations therein contained, and also set forth some new matter. At the January term, 1889, the case was tried before the court and a jury, and the jury in answer to the following interrogatories made the following special findings, to wit:

"Ques. 1. What were the respective ages of the plaintiffs in 1870? Ans. Fidelia C. Everett was 25 years old, Ernest Barlow was 23 years old, Huldah A. Frazier was 19 years old, Mattie A. Allen was 17 years old, Flo Ellen Viers was 14 years old, Eldora A. Thompson was 11 years old, Frank F. Barlow was 9 years old.

"Q. 2. Describe the house erected on the premises in controversy in the year 1870, giving its dimensions and inside height in the clear from the floor, stating the number of rooms it contained, how deep it was set in the ground, what kind of floor it had, what material the walls were made of, and what kind of a roof it had. A. Log house, 18 x 22 feet; inside height, 8 feet; one room; two feet in ground; dirt floor; logs in walls; poles and dirt roof.

"Q. 3. Where and how were the materials for the walls of the house in controversy, erected in 1870, obtained? A. Poles and logs obtained from government land on Solomon river; windows and material for doors purchased.

"Q. 4. When was the first floor put in the house erected on the Barlow farm in 1870, and of what material was it made? And where and how was the material obtained? A. Was put in about one year after house was built; was made of cottonwood, the logs of which was taken to saw-mill at Beloit by David Williams.

"Q. 5. Who performed the labor required in erecting the

---

Barlow v. Barlow.

---

house built on the Barlow farm in 1870? A. Elizabeth Barlow's sons, principally; F. P. Barlow helped to roll up logs.

"Q. 6. Was a well dug on the Barlow farm in 1870; and if so, who dug it; how deep was it; and if walled, with what material was it walled, and when and how was the material obtained? A. Yes; well was dug about 46 feet deep; David Williams and Pythagoras Galbraith did the labor; walled with stone procured from government land.

"Q. 7. Were any improvements made on the house originally erected on the Barlow place in 1875 or 1876? And if so, what improvements were made? A. Addition 16x22 was built, frame house raised to 1½ story; two pine floors and shingle roof put on, and stone wall two feet high put in as foundation.

"Q. 8. If you find that anything was added to the walls of the house on the Barlow farm in 1875 or 1876, of what material was the addition made, and where and how was the said material procured? A. Stone quarried from government land by David Williams.

"Q. 9. If you find that any floors were put in the house on the Barlow farm in 1875 or 1876, state how many such floors there were, and of what material they were made? A. Two pine floors.

"Q. 10. If you find that any roof was put on the house on the Barlow farm in 1875 or 1876, state what material said roof was made of? A. Cottonwood shingles.

"Q. 11. Was any prairie ground broken for cultivation on the Barlow farm between April, 1870, and March 13, 1877? If you should find that there was, state when it was done, who did it, and how much was done. A. There were 60 to 70 acres broken, in different years between 1870 and the spring of 1877; done principally by David Williams; Barlow did a little.

"Q. 12. Was any building intended as a granary erected on the Barlow farm between the years 1870 and 1877? If you find that there was, state its dimensions, whether divided into rooms; what material was used in its construction; where and how the material was obtained; what kind of a roof was put on it; who performed the labor of constructing it; and any other matter of description of the building you may find. A. Granary built, one part stone and one part cottonwood lumber; lumber part, 10x16 feet, and stone, 12x16; pine shingle roof; stone from government land and lumber from

## Statement of the Case.

logs from government land; labor of constructing and getting material done entirely by David Williams.

"Q. 13. Was any building intended as a stable erected on the Barlow farm between the years 1870 and 1877? If you find that there was, state its dimensions; what material it was made of; how it was covered; where and how the material was obtained and who performed the labor of constructing it; and when it was built. A. Yes, in 1872 or 1873; built of logs; poles and dirt roof; from government land; labor of procuring material and erecting stable performed principally by David Williams; F. P. Barlow did some of the work of erecting; 16x20 or 16x24 feet.

"Q. 14. If you find there was a corral constructed on the Barlow farm between April, 1870, and 1877, state when it was made; where it was located; the material used in it; when and how the material was obtained; and who performed the labor of constructing it. A. There were two corrals, one about house and well, and one for cattle, built of logs and poles, taken from the farm.

"Q. 15. Was the improved land on the Barlow farm cultivated during any of the time between April, 1870, and March 13, 1877? If so, who performed the labor of cultivating it? What kind of crops were raised, and on what years were crops raised? A. Yes; cultivated every year. Had some crops, principally wheat and corn, every year; labor performed principally by Mrs. Barlow's sons; Barlow occasionally did a little work in the field.

"Q. 16. Was the house erected on the Barlow farm in 1870 used as a place of residence by any persons between the time of its erection and March 13, 1877? If so, by whom was it used? A. Yes; by Mr. and Mrs. Barlow and Mrs. Barlow's sons.

"Q. 17. Who managed and directed, if anyone, the labor performed on the Barlow farm between April, 1870, and March 13, 1877? A. It was usually managed and directed by F. P. Barlow.

"Q. 18. Was any stock kept on the Barlow farm between April, 1870, and March 13, 1877? If so, what different kinds of stock; during what time was each kind so kept; and where was the feed raised by which said stock was kept? A. Yes; horses, all the time; hogs, from 1872 or 1873; cattle, from 1873. Feed was raised on farm, except that cattle were herded on this and other lands.

"Q. 19. What improvements were made on the Barlow farm after March 13, 1877, and before the death of F. P. Barlow, and who performed the labor of making said improvements? A. About 1,000 small forest trees one to two years old, set out;  $\frac{1}{2}$  mile hedge plants, set out; 27 currants, 75 or 80 raspberries, 15 grapes, 12 gooseberries, some cherry trees and peach trees; house was sided up on outside with pine siding, and window and door casings put in.

"Q. 20. If you find that any forest trees were planted on the Barlow farm between March 13, 1877, and the death of F. P. Barlow, state where said trees were procured. A. Procured from Solomon river.

"Q. 21. If you find that any hedge was planted on the farm in controversy between March 13, 1877, and the death of F. P. Barlow, state where the hedge plants so planted were raised. A. Were raised on the farm.

"Q. 22. If you find that Frederick P. Barlow, at any time or times after he homesteaded the land in controversy, and before March 13, 1877, promised the title to said land to Elizabeth A. Barlow, state the words with which he made such promise or promises. After giving said words, state the reply to them (if any) made by Elizabeth A. Barlow. A. After F. P. Barlow returned from Junction City, he told Mrs. Barlow he had homesteaded the land in question. He said they would build a house on the land, move onto it, improve it, and make a home of it. She said she was willing to go on the land and improve it and work it. She said she would furnish the money and labor to improve the land, provided she could have the deed to it. He said she should have the deed of it as soon as he could get it from the government. He said he wanted her to furnish him a home on the farm as long as he lived, and she said she would do it.

"Q. 23. If you find that Frederick P. Barlow, at any time or times after the 13th day of March, 1877, promised the title to the land in controversy to Elizabeth A. Barlow, state the words which he used in making such promise or promises. After giving said words, state the reply to them (if any) made by Elizabeth A. Barlow. A. When F. P. Barlow returned home with the receiver's receipt, and on or about the 14th day of March, 1877, he said to the defendant Elizabeth, in the presence and hearing of her sons: "Mother, you are monarch of all you survey. I have proved up upon the farm without difficulty, and it is yours now. You may go on and take charge

## Statement of the Case.

of, manage it and improve it just as you please, and as soon as I can get a patent from the government I will deed it to you [referring to the land in controversy]; your money bought it, and you and your sons improved it, and I mean that you shall have it. I want you to furnish me a home and a living on the land while I live." In response to this, Mrs. Barlow said he should have a living, of course, while he lived; she thought she ought to have the land; it was hers; he agreed to give it to her before she came; that she was to have the land they got in this country provided they came here; that she was willing to do that.

"Q. 24. What physical ailment other than with his eyes did F. P. Barlow have after he came to Kansas, and before his last sickness? A. None shown by the evidence.

"Q. 25. Did F. P. Barlow's eyes grow worse or better as he continued to reside in Kansas? A. Generally grew worse, but sometimes worse than at others.

"Q. 26. At what period of his residence in Kansas did F. P. Barlow (if at all) have to be led about by reason of his blindness; and how much of the time during the said period did he have to be so led? A. At different times, about 1871.

"Q. 27. Did F. P. Barlow perform any of the labor of improving the land in controversy? A. Yes, he did some labor; in field and other heavy work he did very little; but in light matters, taking care of things generally, he did a good deal.

"Q. 28. Did Frederick P. Barlow, at any time after April, 1870, execute and deliver to Elizabeth A. Barlow an instrument in writing purporting to convey any personal property to her? If so, state if said instrument was acknowledged before an officer, and what officer. Also state what consideration (if any) was mentioned as coming from Elizabeth A. Barlow, and what personal property said instrument purported to convey to Elizabeth A. Barlow. A. He did make and deliver to her an instrument in writing, of which the following is a copy, viz.:

"STATE OF KANSAS, MITCHELL COUNTY, SS.

"KNOW ALL MEN BY THESE PRESENTS, That I, F. P. Barlow, of Be-loit township, Mitchell county, Kansas, for the sum of \$547, to me in hand paid by Elizabeth Barlow, of the same place, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey unto the said Elizabeth Barlow, her heirs and assigns, the following-described property, to wit: 1 white cow and calf, 1 roan cow, 1 white and red cow and calf, 1 red and white cow and calf, 1 red heifer and calf, 1 red cow, 1 white and red cow, 2 hogs, 1 yoke of oxen, and 1 bay mare; to have and to hold the same, unto the said Elizabeth Barlow, her heirs and assigns forever. And I, F. P. Barlow, do

## Barlow v. Barlow.

hereby covenant and agree that I will forever defend the aforesaid property to and for the said Elizabeth Barlow, her heirs and assigns, against the lawful claim or claims of all persons whomsoever.

F. P. BARLOW.

"Personally came before me, Joel Miley, justice of the peace in and for Beloit township, Mitchell county, Kansas, F. P. Barlow, well known to me, and acknowledged the execution of the within instrument to be his voluntary act and deed. Given under my hand, this 23d day of May, 1872.

JOEL MILEY, *Justice of the Peace.*

"Executed in the presence of D. C. Kepler."

"It does not appear from the evidence just when it was delivered, but it was in her possession in 1885 or 1886.

"Q. 29. When did Frederick P. Barlow leave the plaintiffs, and what provision (if any) did he make for the maintenance of such of the plaintiffs as were minors at any time during their minority? A. He left them in 1864, and never made any provision for their maintenance afterward.

"Q. 30. Who, if any one, has had the possession and use of the land in controversy since the death of Frederick P. Barlow? A. Elizabeth A. Barlow.

"Q. 31. What was the value of the improvements made on the house on the land in controversy after March 13, 1877, and before Barlow's death? A. \$75.

"Q. 31½. What was the value of the forest trees and hedge planted on the land in controversy after March 13, 1877, after being so planted? A. From \$60 to \$65.

"Q. 32. For what materials used in the construction or improvements on the land in controversy did Elizabeth A. Barlow furnish money? A. She paid out money for all the materials that were bought.

"Q. 33. Before making a homestead entry upon the lands in controversy, was it agreed between Frederick P. Barlow and the defendant Elizabeth A. Barlow that the said Frederick should, with moneys to be furnished by said defendant, make a homestead entry upon said lands; that said lands should be improved and cultivated by means and labor to be furnished and employed by said defendant; that said Frederick P. Barlow should have a home upon said lands with said defendant; and that after a patent for said lands was issued to the said Frederick P. Barlow, that he, the said Frederick P. Barlow, should deed and convey the same to the said defendant Elizabeth Barlow? A. There was no agreement as to this particular land or to any homestead, but it was agreed that they should take land or buy land in Kansas, and she should have the title to it.

## Statement of the Case.

"Q. 34. Did the said defendant Elizabeth Barlow furnish to said Frederick P. Barlow the moneys with which he made entry upon the land in controversy, and with which he went to and from the land office? A. Yes.

"Q. 35. Did the said Frederick P. Barlow make a home-  
stead entry upon the land in controversy, to wit, the north-  
west quarter of section 6, in township 7, of range 7 west, in  
Mitchell county, Kansas; if so, about what date did he make  
such entry? A. Yes; about April, 1870.

"Q. 36. Did the defendant Elizabeth Barlow furnish money  
and means with which to procure, and with which was pro-  
cured and made improvements upon the land, and by means  
of which she furnished a home to said Frederick P. Barlow;  
and did she invest her money in improvements and in stock,  
tools, agricultural implements and other personal property  
which was kept on the land and used in its improvement, and  
for the support and benefit of said parties? [Plaintiffs ex-  
cept to submission of this question.] A. Yes.

"Q. 37. State the physical condition of Frederick P. Bar-  
low in the years 1870, 1871, and 1872; and state particu-  
larly the condition of his eye-sight during that period. A.  
His eyes were sore all the time. Sometimes worse than others;  
part of the time he was so nearly blind as to require being  
led about.

"Q. 38. After the receiver's final receipt was issued, and  
on or about the 14th day of March, 1877, did the defendant  
Elizabeth Barlow take charge of the lands in controversy;  
and if she did, did she continue to have charge of the same up  
to the death of Frederick P. Barlow? A. She took charge  
of the improvements, setting out hedge and forest and fruit  
trees, and siding up the house. Barlow was sick during all  
or nearly all the time these improvements were being made,  
and confined to his bed about 10 days before he died.

"Q. 39. In what manner, if at all, did the said Frederick  
P. Barlow deliver possession of the lands in controversy to  
said defendant Elizabeth Barlow, on or about the 14th day of  
March, 1877? A. In addition to the conversation before  
found, he gave her the receiver's receipt, and told her to take  
it and take care of it.

"Q. 40. State whether Egbert Williams worked upon the  
land, and state also whether he brought his wages home, and  
whether the same were used for the benefit of the family?  
A. He worked on the land some, and worked out for farmers



## Barlow v. Barlow.

in the neighborhood some, and brought some of his earnings home and gave them to his mother.

"Q. 41. State whether Charlie Williams and Arthur Williams worked upon the land? A. They worked on the land and herded cattle.

"Q. 42. When Frederick P. Barlow came to Kansas, did he have any money or any means of his own? A. He had little if any in Kansas. If he had anywhere else, it is not shown.

"Q. 43. State what property and money the defendant Elizabeth Barlow had at the time she and Frederick P. Barlow moved to Kansas. A. \$600 cash; \$310 in notes, afterward paid; 5 horses; 1 wagon, and 2 sets of double harness.

"Q. 44. State what moneys she received from time to time after they removed to Kansas, aside from that which was earned by the joint efforts of herself or family? A. \$310 from notes, and \$14 each month as pension to herself and children up to November 19, 1872, and \$12 as pension from thence until the death of F. P. Barlow.

"Q. 45. Before the year 1885, did the defendant Elizabeth Barlow at any time know, or was she advised, that she had the right to compel the making of a deed to the lands in controversy to herself? A. No.

"Q. 46. Before the year 1885, did either of the plaintiffs ever make any claim to any part of or interest in the lands in controversy? A. No.

"Q. 47. Did Elizabeth A. Barlow in fact receive from F. P. Barlow any property under and by virtue of the bill of sale in evidence other than property which she had owned before the making of such bill of sale? A. She did not receive any such property from him as is described in the bill of sale on the farm in question, and as to whether she received from him at all there is no evidence unless it be the bill of sale itself."

The court also made the following findings and delivered the following opinion, to wit:

"FINDINGS AND OPINION OF THE COURT.

"Under the findings of the jury in this case, and the admission of fact, it is clear that the plaintiffs are the heirs at law of the deceased, Frederick P. Barlow, and are entitled to a partition of the estate claimed, unless the defendant Elizabeth A. Barlow has proven such a contract between herself and Frederick P. Barlow in his life-time to convey the land to

## Statement of the Case.

her, and such a part performance of the contract on her part as would take the contract, which is alleged to be oral, out of the statute of frauds, and would entitle her to a decree of this court for a specific performance of such contract on the part of herself and Frederick P. Barlow. So far as the first contract shown in evidence, made in Iowa before the parties came to this state, is concerned, it is too indefinite to admit of a decree of specific performance, and of course no specific performance of that contract is claimed in this case. The contract found by the jury as having taken place after the land in question was homesteaded by Frederick P. Barlow it is claimed is void, as being in violation of the statute of the United States relating to the transfer of homesteads before the issuing of patent thereon.

“That statute was evidently enacted for the purpose of securing to the homesteader and his family a home. So far as it relates to the individual interest, and so far as public interests are concerned to get the public domain into the possession and ownership of citizens, who should own and cultivate the land upon which they reside, and while any agreement or contract to convey the homestead to any third party before the issuance of a patent is prohibited for the purpose of preventing speculation in the public domain, I see no reason for prohibiting a contract which could only result in benefit to the same parties which the law contemplates should be benefited by the homestead entry—that is, the homesteader and his family. This contract, it appears by the findings, was ratified or renewed after the issuing of the receiver's receipt for the land, and after Frederick P. Barlow had proved up on his homestead, but perfected his title thereto as far as any act on his part could perfect it. It appears from the findings of the jury that all the cash expenditures for improvements of all kinds made upon the land, and for the support of the family during the making such improvements, were borne by the defendant Elizabeth A. Barlow, except such as may reasonably be inferred were paid from the products of the farm and the stock thereon. The findings and evidence do not show that at any time during the time the deceased, Frederick P. Barlow, and the defendant Elizabeth A. Barlow resided upon the land did Frederick P. Barlow remove from the land and deliver to the defendant the exclusive possession of the land. It does appear, however, that he delivered the charge and control of the place over to her, after the issuance of the receiver's re-

---

Barlow v. Barlow.

---

ceipt, as fully and as completely as would be consistent with the terms of the contract and the relation between the parties. If an open, notorious and exclusive possession of the real property in question is essential to the decree of specific performance, the decree in this case ought to be refused. It is claimed on the part of the plaintiffs that the decree of specific performance in this case would be inequitable as to them; that their right to a share of the property of their father is paramount to the equities, if any, shown by the defendant Elizabeth A. Barlow under her contract, and the court would readily adopt this view of the case, if the subject-matter of the action were land which had been acquired by Frederick P. Barlow independently of the defendant; but the consideration paid by Frederick P. Barlow for the land in question and the manner of acquiring it seems to me a matter which the court should take into consideration in determining this question, and it appears to me more than probable under the evidence and findings in the case that, but for the contract and understanding which have been alleged and found between Frederick P. Barlow and the defendant Elizabeth A. Barlow with reference to this land, and the performance of the same on her part, that the deceased, Frederick P. Barlow, would never have had any estate in the land which the plaintiffs could have claimed. It is true that the contract is more favorable to the defendant Elizabeth A. Barlow, probably, than for the deceased, Frederick P. Barlow, and was at the time it was made, but this is no objection to the validity of the contract, and seems to have been voluntary on his part, and with full understanding of the same in accordance with his intentions. That she performed all the conditions of the contract on her part to his satisfaction during his life-time, is not questioned by the evidence or findings; indeed, it appears the contract was fully performed on her part.

“While the court is in a great deal of doubt as to the question of possession, and the character of possession, requisite under the decisions of our courts, and while it is true that many of the acts which it is claimed were done in the execution of the contract on the part of the defendant Elizabeth A. Barlow might possibly have been done solely by reason of her relation to Frederick P. Barlow, and were such as only might have emanated from love and affection which should be presumed to exist between the parties in such a relation, still, if the evidence and findings make it clear that the par-

---

Statement of the Case.

---

ties did in fact contract, and with reference to what should be done by the defendant and the deceased, Barlow, and that their contract, which was one they had a right to make, included certain things which might reasonably have been expected by Frederick P. Barlow without contract, I think that such acts should be construed with reference to the contract which is found by the jury from the evidence to have been made, and should not be disregarded because possibly they might be referred to some other obligation or relation.

"So far as the consideration of improvements is concerned, they are not found to be very large, but it seems to me that this matters little when we consider that at the time of the making of the first contract, after the homestead entry was made, the subject-matter of the contract was probably of little or no cash value, and their contract together to proceed to live upon, improve and make a home upon the land was in the nature of the contract of copartnership, by which the defendant Elizabeth A. Barlow undertook to put in the cash necessary to maintain the family and make the improvements, and to furnish labor to make the improvements, and Frederick P. Barlow, for the use and benefit of himself and family, put in his homestead right, with the understanding that the defendant Elizabeth should have legal title to the land as soon as it could be secured. Under these circumstances, it seems to me this is a small objection to the enforcement of a contract, that the consideration paid was a small consideration, if it is equitable. It was a matter that extended through years of time, and I think that the things done by the defendant in execution of the contract are not all of a character that could be computed in dollars and cents as to their value, although most of the matters that went to make up such consideration might possibly have resulted from the relation of husband and wife. If the husband sees fit to pay his wife for such services, I don't know of any law to prevent him, or any equitable consideration that would prevent him from so doing, especially if he does so with full understanding, and no one is injured thereby. After such a contract is fully executed on one side and only death prevents its execution on the other, if it is equitable, as it appears to have been in this case, I think the court should decree its specific performance on the part of the heirs of the decedent who was prevented by death from doing what he fully intended to do.

"The decree will be in favor of the defendant Elizabeth A.

---

Barlow v. Barlow.

---

Barlow, for a specific performance of the contract, in accordance with the prayer of her answer."

The plaintiffs excepted to each and every one of the findings of the court. The court also found generally in favor of the defendant *Mrs. Barlow*, and against the plaintiffs, and rendered judgment accordingly; and the plaintiffs, as plaintiffs in error, have brought the case to this court for review, making *Mrs. Barlow* the defendant in error.

*Horace Cooper*, for plaintiffs in error.

*A. H. Ellis*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: In 1868, the widow Elizabeth A. Williams, and the widower Frederick P. Barlow, were married in Iowa, each having children by a former marriage, Elizabeth having four sons—David, Egbert, Charles, and Arthur. She at the time had considerable property, and with her children was drawing a pension of \$16 per month. He had no property of any consequence. In 1869, he became nearly blind, and he continued so during the remainder of his life. They then agreed to come to Kansas and procure land, and that whatever property they might obtain should belong to her. In the early spring of 1870 they removed from Iowa to Kansas, and settled in Mitchell county, upon 160 acres of government land (the land now in controversy); and in April of that year a homestead entry thereof was made in the name of the husband, she furnishing all the money to pay all the costs and expenses. At the time of their removal she had \$600 in cash, \$310 in good promissory notes which were afterward paid, five horses, one wagon, and two sets of double harness; and she and the children were then drawing a pension of \$14 per month. He had no property. Afterward improvements were made upon the land, and these were all made by her and her sons, they having come from Iowa to Kansas with Barlow and wife. His children remained in Iowa, and have never resided in Kansas, and are now the

## Opinion of the Court.

plaintiffs in this action. On March 13, 1877, final proof was made regarding this homestead entry, and a proper receipt or certificate was given. The proof was also made and the receipt or certificate issued in the name of Barlow, Mrs. Barlow furnishing the money to pay all the costs and expenses. On March 14, 1877, Barlow delivered to her the certificate and told her again that the land was hers, and that he would execute a deed to her for it after the patent should be issued, and that they would build a house thereon and make other improvements thereon; that he wanted her to furnish him a home on the land as long as he lived, and she said she would do it, and that she would furnish the money and labor to make the improvements. She continued to make improvements on the land up to the time of Barlow's death, and afterward. On April 23, 1877, Barlow died intestate, and without having executed to Mrs. Barlow any deed for the land. She and her children were then drawing a pension of \$12 per month. She continued to live upon the land and to make improvements thereon; and on September 1, 1885, more than eight years after Barlow's death, his children and heirs brought this action for partition, claiming that they in the aggregate were entitled to one-half of the land. Mrs. Barlow has continuously resided upon the land ever since about April, 1870. She furnished all the money to procure the land and to make all the improvements thereon, and all this with the agreement and understanding between herself and her husband, before they left Iowa and afterward up to the time of his death, that the land should be hers; and the only question now presented is, whether upon all the facts of the case the land is hers or not.

We think this question must be answered in the affirmative. (Act relating to Trusts and Powers, § 8; Gen. Stat. of 1889, ¶ 7166; *Newkirk v. Marshall*, 35 Kas. 77; *Franklin v. Colley*, 10 id. 260; *Edwards v. Fry*, 9 id. 417; *Twiss v. George*, 33 Mich. 253; *Littlefield v. Littlefield*, 51 Wis. 23; *Johnson v. Hubbell*, 8 N. J. Eq. 332; *Davison v. Davison*, 10 id. 246; *Rhodes v. Rhodes*, 3 Sandf. Ch. 279.) Ever since the early

---

Griswold v. Huffaker.

---

spring of 1870, Mrs. Barlow has been in the actual possession of the property, with and in pursuance of the agreement and understanding between herself and husband that the property should be hers. All the money expended for the procurement of the property, and for putting improvements thereon, was hers; and although Mr. Barlow was the nominal head of the family, yet, because of his infirmities, she was the real and actual head thereof. The agreement between herself and husband was not to destroy their homestead interest in the property, or the homestead interest of either, or to deprive either of the occupancy thereof, but it was simply to transfer the title to the homestead from the nominal head to the real head of the family, and the husband was to remain on the homestead and occupy it as his home as long as he should live; and even with the title in his wife, she could not, under our homestead exemption laws, deprive him of his right to occupy it as his homestead as long as he should live.

In our opinion, all the equities in the case are in favor of Mrs. Barlow, and as the court below so held and gave her the property, its judgment will be affirmed.

All the Justices concurring.

---

WILLIAM GRISWOLD *et al.* v. W. J. HUFFAKER.

**HOMESTEAD** — *What Constitutes* — *Highway* — *Dedication* — *Estoppel*. The owner of a strip of land whose acts have been such as to estop him from denying that it is a public road, and have induced the public to use it as such, and have caused the officers of the township and the overseer of the road district in which it is situate to work and improve it, is entitled to hold as a homestead a tract of land on both sides of such strip of land consisting of less than 30 acres.

*Error from Wyandotte District Court.*

ACTION by W. J. Huffaker against Wm. Griswold and Thomas Bowling, as sheriff of Wyandotte county, to enjoin

---

Opinion of the Court.

---

the sale of certain land. Judgment for plaintiff. Defendants bring error. The facts are fully stated in the opinion.

*Hutchings & Keplinger*, for plaintiffs in error.

*McGrew & Watson*, for defendant in error.

Opinion by SIMPSON, C.: The plaintiff in error, Griswold, being a judgment creditor of the defendant in error, had an execution issued and levied upon  $4\frac{1}{2}$  acres of land belonging to the defendant in error. The sheriff of the county being about to sell the land, the defendant in error commenced this action in the district court of the county to enjoin the sale, and at the trial recovered a judgment perpetually enjoining the sale of said land. The object of this proceeding is to reverse said judgment. The sole question for solution is, whether or not the land levied upon was at the time of the levy a part of the homestead of the defendant in error, and hence not subject to levy and sale by reason of the constitutional exemption. The land of the defendant in error consists of about 26 acres, and is divided by a street, or a public highway, running through it, so as to cut off the  $4\frac{1}{2}$  acres from the larger tract, that contains the dwelling-house and out-buildings on the east side of the street or highway. The case was tried below on an agreed statement of facts, in the words and figures following, to wit:

“The injunction asked for by plaintiff should be denied, unless the premises about to be sold were a part of the homestead of the plaintiff at the time of the levy. Whether said premises were a part of plaintiff’s homestead at the time of the levy depends upon the following: (1) In 1860 the owners of a large tract of land, of which the land of plaintiff herein-after mentioned is a part, laid the same out and subdivided it into lots, blocks, streets, and alleys, and platted, acknowledged and recorded the same as the town-site of Quindaro, among which streets was Kansas avenue, of the width of 90 feet; (2) thereafter the plaintiff became the owner of a tract of a little over 20 acres, lying on the east side of and abutting upon one of the streets in said town-site named ‘Kansas avenue,’ and at the same time he became the owner of about  $4\frac{1}{2}$  acres of land lying and abutting upon the west side of said



Griswold v. Huffaker.

Kansas avenue, directly opposite the tract of about 20 acres before mentioned. The  $4\frac{1}{2}$ -acre tract above mentioned is the same tract of land that the sheriff is alleged to be about to sell. On the 30th of August, 1873, a petition signed by Eben Blackly, also plaintiff and eight others, was filed in the office of the county clerk of Wyandotte county, in the following language:

*"To the Honorable Board of Commissioners of the County of Wyandotte, State of Kansas:*

*"THE UNDERSIGNED represent respectfully that they are the owners of a large majority of all the lots and blocks within the following-described boundaries in the town of Quindaro, in said Wyandotte county, to wit: [ Here follows a lengthy description of land, which includes the lands of plaintiff above mentioned.] Also, that said lots and blocks within said boundaries are not occupied for the purpose of a town or village, and they therefore pray that said lots and blocks and the streets and alleys along said boundaries be vacated, with the following exceptions, which we petition to be declared public highways, to wit: [ Here follows a lengthy description of streets and alleys, among which was the following portion of Kansas avenue, to wit: Sixty feet on the west side of Kansas avenue from Walnut avenue to Seventh street, which includes that portion of Kansas avenue which lies between and contiguous to the two tracts of plaintiff's land above mentioned.]*

*(Signed)*

*EBEN BLACKLY, for himself, and as  
President of the Board of Trustees of the Freedman's University.*

*W. J. HUFFAKER.*

*WM. T. BOWEN.*

*S. D. STORES.*

*E. J. EBY.*

*D. W. MOUNT.*

*BIRD BARNETT.*

*JOSEPH ENDICOTT.*

*J. W. LEWIS.'*

*"Which petition was duly verified by affidavit, showing that said petitioners were the owners of a majority of the lots and subdivisions in said town-site concerning which said action was sought to be taken.*

*"Afterward, on September 2, 1873, a notice, of which the following is a copy, excepting the boundaries and streets and alleys therein named, which are the same as in said petition, was filed in the office of the clerk of said county, to wit:*

*"NOTICE.*

*"Notice is hereby given, that a petition will be presented to the board of commissioners of the county of Wyandotte and state of Kansas, at their regular meeting in September, 1873, to vacate the blocks, lots, streets and alleys in the town of Quindaro, included within the following boundaries, to wit: [ Here follows description, the same as in the petition above mentioned,] with the following exceptions of streets and alleys, which will be declared public highways, to wit: [ Here follows description of streets and alleys, the same as in the petition above mentioned.]*

*(Signed)*

*W. J. HUFFAKER,*

*One of the Principal Petitioners.'*

## Opinion of the Court.

“Attached to which notice was an affidavit of R. B. Taylor, in due form, showing that said notice had been duly published four consecutive weeks in the *Wyandotte Gazette*, a newspaper published and of general circulation in said county. Also on the same day, to wit, September 2, 1873, there was filed in the office of the clerk of said county aforesaid a similar notice, except that the copy so filed was not signed with due proof that the same was duly posted on said premises for more than three weeks. There is no evidence in the records of the board of county commissioners of said county that either of said notices was ordered by said board, or that said petition was ever brought to the notice of said board prior to September 2, 1873. On August 7, 1873, the following, among other proceedings, were had before the board of county commissioners of Wyandotte county, as shown by the record of the proceedings of said board: ‘On motion the board adjourns to meet on Monday, the 1st day of September, 1873.’ On Monday, September 1, 1873, said board met and transacted business, but did not take any action in regard to the said petition, or in regard to the vacation of any portion of the town-site of Quindaro, and adjourned until the next day. On Tuesday, September 2, 1873, said board met, and among other transactions were the following, as shown by the record of said board: ‘On motion, the board, after hearing the petition of E. Blackly and the evidence of several witnesses in the matter of vacating certain lots, streets and alleys in Quindaro, continued the same until to-morrow at 1 P. M.’ September 3, 1873, the following among other proceedings were had, as shown by the record of said board: ‘At this day, the petition of Eben Blackly, for himself and as president of the board of trustees of the Freedman’s University, W. J. Huffaker, and others, representing that they are the owners of a large majority of all the lots and blocks within the following-described boundaries in the town of Quindaro, in said county of Wyandotte, to wit: [Here follows description as in the petition.] Also said lots and blocks within said boundaries are not occupied for the purpose of a town or village. And they therefore pray that said lots and blocks and streets and alleys within and along said boundaries be vacated, with the following exceptions of streets and alleys, which we petition to be declared public highways, to wit: [Here follows a list of streets and alleys as in petition, among which is that portion of Kansas avenue before mentioned, which separates said tracts of plaintiff.] The board, after

---

Griswold v. Huffaker.

---

hearing the evidence in favor and against the proposed vacation, the parties interested compromise the matter by signing the following agreement:

"It is hereby agreed by and between the parties hereto, and the undersigned, being all the parties interested in the vacation, that 10th street, 30 feet wide through the center, shall be left open from F street to the east side of X street, and vacated from T street west to Kansas avenue; that Creek shall have an alley 16 feet wide between V and W streets, through the center of the block, instead of an alley from 10th to 9th, and from 9th to alley between W and X, thence along the same to 8th street, which shall be vacated, and all opposition to vacation is withdrawn.

PHILLIP CREEK.  
EBEN BLACKLY.  
W. J. HUFFAKER.  
ADAM BARNETT.  
THOMAS BURNES.  
CHAS. MORASCH.  
CHAS. MCGEARY.'

"On motion, the attorney was given until the November meeting to prepare the order of vacation, and to obtain the necessary description of the land vacated. On the 9th of October, 1873, the following proceedings were had before said board, as shown by the record thereof:

"In the matter of the vacation of the town-site of Quindaro, continued from last term: And now on this day come the parties and present their several petitions to the board, together with their agreement, signed by all the parties; and it being shown to the board that all the parties in interest have had due notice and consented to the same, and that the law relating thereto has in all respects been complied with, and that said proceedings are regular and correct, it is therefore ordered, adjudged and decreed by the board that the prayer of said petitioners be granted, and that the several portions of said town-site of Quindaro and the additions thereto be and the same is now by said board in open and regular session declared vacated; and that the same shall hereafter be known, designated and described by metes and bounds in the manner following: [Here follows description by metes and bounds of a large number of tracts, including the land of the plaintiff described in his petition herein.] And it is further ordered, that the clerk enter upon the proper books of the county this order, and upon the tax rolls the description herein set forth, and furnish a copy of the same to the register of deeds for record.'

"The above are all the orders made and proceedings had by said board in said matter. Save as above set forth, the board of commissioners never made the certificates provided for in § 24, chapter 109, General Statutes 1868; nor is there any evidence that the certificates or descriptive map provided for in the same section were ever filed in the office of the register of deeds of Wyandotte county. Ever since the proceedings and orders above set out by and before the board of county commissioners of said county, 60 feet off the west side of what

---

Opinion of the Court.

---

was designated as Kansas avenue on the plat of the town-site of Quindaro aforesaid have been used as a public highway, and have been worked and kept in repair by and under the supervision of the road overseer of road district number — of the township of Quindaro (within the limits of which the same is situated) and the township officers of said township, the same in all respects as other roads and highways in said road district. The lands within the limits of said town-site of Quindaro have ever since said proceedings and orders above set out been occupied and used as farming lands, and in no respect have been occupied, used or treated as town lots, or for any purposes of a town or village. The plaintiff is a citizen of the state of Kansas, and the head of a family; and ever since said proceedings for the vacation of said town-site has used and occupied all the land described in his petition herein for farming and gardening purposes, the house where he has remained with his family being upon that portion lying east of what was formerly Kansas avenue above mentioned, and all of said land is and was at the time of the levy of said execution used and occupied by said plaintiff and his family as a homestead, unless the character of the highway above mentioned, formerly known as Kansas avenue, is and was at the time of such levy such as to deprive said plaintiff of his homestead rights in that portion lying west of said highway."

It appears from the agreed statement of facts that in 1860 the plat of Quindaro town-site was filed in the office of the register of deeds of Wyandotte county, and that the strip of ground that now separates the land of the defendant in error into two parts was one of the streets dedicated by that plat, and was known as Kansas avenue, and was described as being 90 feet in width. If it is still a street, with the fee vested in the county, it is such a segregation of the four and one-half acres from the larger tract that the two cannot be included in and constitute one homestead. (*Randal v. Elder*, 12 Kas. 257.) If it is not a street, but has been vacated by the express terms of a legislative act or by proper proceedings before a tribunal having power to declare a vacation, and is a highway laid out by proper authority, or created by user, and is an easement resting on the land by either of the creative modes, then the defendant in error is entitled to hold and enjoy the land on both

sides of the highway as a homestead. (*Pilcher v. A. T. & S. F. Rld. Co.*, 38 Kas. 516.) In 1860 the strip of ground in question was a public street, but the defendant in error claims, first, that it was vacated as a public street by the express terms of an act of the legislature entitled "An act to repeal an act entitled 'An act incorporating the city of Quindaro,' approved January, 1859, and all acts or parts of acts amendatory or supplemental thereto," approved March 6, 1862, and found on page 407, General Statutes of 1862. Such act reads as follows:

"SECTION 1. That an act incorporating the city of Quindaro, approved January 25, 1859, and all acts or parts of acts amendatory or supplemental thereto, are hereby repealed.

"SEC. 2. That nothing in this act shall affect or interfere with the rights acquired by individuals or companies under the said act of incorporation, and no road, street or alley laid out or established under the act aforesaid shall be vacated except by the provisions of an act entitled 'An act vacating streets and alleys,' approved February 25, A. D. 1862.

"SEC. 3. That it shall be the duty of the trustee of Quindaro township, to take immediate possession of all books, papers, assets and property of every kind belonging to the city of Quindaro, dispose of the same and discharge the indebtedness of said city. In the performance of these duties he shall have and may exercise all the powers of the officers provided for in the act of incorporation aforesaid."

Waiving the discussion of all doubtful questions about the constitutionality of this act, or the power of the state legislature to pass it, we need only state that it is, or might be, claimed that the first section of the act, by its terms, vacates all streets and alleys, as well as lots and blocks, in the town-site of Quindaro, except those especially saved in the second section, and that the excepted ones consist of those in which vested rights might have been acquired by the purchase of lots and blocks for residence and business purposes, bounded by such streets and alleys. Again, it is contended that the excepted ones in the second section are only such streets and alleys as may have been laid out under and by virtue of the powers granted the common council of the city of Quindaro

---

Opinion of the Court.

---

under the act of 1859 incorporating the city. On the other side, it is contended that the disincorporating act of 1862 did not by its own terms vacate any of the streets and alleys, but left them to be vacated under the provisions of a general law in force at that time, mentioned in the second section, and as that law is still in force, or was in 1873, that no vacation could be had except under its provisions. Another contention is, that the street was vacated by the express terms of section 23 of article 3 of chapter 109, General Statutes of 1868, which is as follows:

“SEC. 23. All lands which have been, either by individual owners, town companies or other incorporated bodies, set apart, surveyed, laid out or platted into towns, cities, or villages, or additions thereto, and descriptions or plats of which may have been made or recorded according to law, but upon which in fact no town, city or village shall have been erected or exists, but which lands so subdivided and platted are unoccupied for the purposes of a town, city, or village, are hereby declared to be vacated as such, and the streets, alleys and lanes shall revert to the owners of the lots platted upon them, in due proportion, and the public grounds to the owners; and all surveys and plats for the subdivision of such lands are declared null and void, and the lands hereby restored to their original condition under the surveys of the United States government, as if no platting for a town had taken place.”

Now, it is said that the condition of things required by the foregoing section existed with reference to the Quindaro town-site, and that therefore this section *ipso facto* reinvested the fee to Kansas avenue in the abutting owners from the 31st day of October, 1868, this being the date at which the act and section above quoted became a law. But whether such a condition of things existed with reference to the Quindaro town-site must be determined in accordance with § 24, which reads as follows:

“SEC. 24. For the purpose of deciding the question whether lands, to which the provisions of the preceding section are sought to be applied, come under its intent, the following procedure shall be complied with, viz.: Upon the written petition of any one or more persons, who, by by their affidavit, repre-

---

Griswold v. Huffaker.

---

sent that they are the owners of a majority of the lots or subdivisions of the town-site, concerning which action is to be taken, the county board of the county in which the lands may be shall advertise, in some newspaper published in the county, and by public notice posted on the land itself, for at least three weeks, that such application has been made, and that, on a stated day, the board will take testimony regarding the occupancy of the lands described; and upon the day fixed in such advertisement, shall so proceed to take testimony. If it appear to the county board, upon the day of hearing, that no inhabitants owning any of the soil, and dwelling upon any definite pieces or parcels of the land, of the quantity of five or more acres in a body, protest against it, then the board shall make its certificate, declaring the provisions of the preceding section duly applied to the land so surveyed, platted, or subdivided, and upon a plainly drawn lithographic map of the whole land, as presented to it for investigation, denote and mark the portions of the survey or subdivision of which, by the application of the preceding section, it has vacated. The county board shall then file such certificate and descriptive map in the office of the register of deeds of the county, and thereafter such land shall be taxed by appropriate description in acres."

It will be noticed from the agreed statement of facts that certain persons attempted to have the action of the board of county commissioners on this question. They filed a petition on the 30th day of August, 1873, with the county clerk, in substantial conformity to the requirements of this section. They caused a notice to be filed with the county clerk, accompanied by proof of its publication in a weekly newspaper, of general circulation in the county, that their petition would be presented at the regular meeting of the board to be held in the month of September, 1873. On the same day, to wit, the 2d day of September, 1873, there was filed in the office of the county clerk a similar notice, but it was not accompanied by any proof that the same had been duly posted on the premises, as the law required. There is no evidence in the record that either of said notices was ordered by the board, or that said petition was ever brought to the notice of the board prior to September 2, 1873. On the 3d day of September, 1873, the

---

Opinion of the Court.

---

order of vacation was made, as recited in the agreed statement of facts, but the board never made the certificate required by the section, and neither the certificate nor the descriptive map was ever filed in the office of the register of deeds, but 60 feet off the west side of said street have been used by the public and kept in repair by the road overseer of the district ever since such proceedings were had by the board of county commissioners, and the lands within the limits of the town-site of Quindaro have, ever since said proceedings, been occupied and used as farming lands, and in no respect have been used as town lots, or for any of the purposes of a town or village. Another vigorous contention of the plaintiff in error is, that no legal notice was given of the presentation of the petition to vacate. The law requires the board of county commissioners to advertise in some newspaper published in the county, and by public notice posted upon the land itself, for at least three weeks, that such an application has been made, and that on a stated day the board would take testimony regarding the occupancy of the lands described. The notice in this case was published in a newspaper, but was not ordered by the board, and was signed by the principal petitioner. Another contention is, that no certificate and descriptive map have been filed in the office of the register of deeds by the board of county commissioners; but it is said against such a claim, that it will not be seriously contended that the failure of the board to perform a plain duty required by law will be chargeable to the petitioners for vacation, they having performed every act required of them, especially when that failure did not or has not in any manner prejudiced the existing rights of the party complaining, who at no time, so far as the record discloses, had any interest in the vacation proceedings.

All these questions have received careful consideration, and yet we think the true solution of the question involved can be determined more satisfactorily, and on a more intelligible basis, by noticing other questions that arise upon the agreed statement. The plaintiff in error in this case has an execution levy on these  $4\frac{1}{2}$  acres of ground. If his lien ripens into a



sheriff's deed, he takes by that only such title and interest as Huffaker had at the time the judgment became a lien on the land. Now, at the time of this levy, what was the legal attitude of Huffaker with reference to this strip of ground? Had not Huffaker's acts estopped him from denying that it was a public highway? He was one of the principal petitioners, and gave the notices in the proceedings before the board of county commissioners, and in accordance with the rule established by this court in the case of *Stewart v. Comm'rs of Wyandotte Co.*, 45 Kas. 708, he has voluntarily invoked for his benefit the order of the board, and is now bound by it, although it is made without authority. His attitude with respect to this strip of ground has been such that he would not be permitted to enjoin the collection of a tax for its improvement, but would be compelled to pay. He could not successfully refuse to perform work on this strip of ground as a public highway, if properly ordered to do so by the road overseer of the district in which it is located and he resides. Can the judgment creditor succeed to his title and repudiate his obligations? The agreed statement of facts recites that ever since the order of the board of county commissioners, 60 feet off of the west side of what was designated as Kansas avenue on the plat of the town-site of Quindaro have been used as a public highway, and have been worked and kept in repair by and under the supervision of the road overseer of the road district in the township of Quindaro within the limits of which this ground is situated, and the township officers of said township have treated the same in all respects as other roads and highways in said township. These results are directly attributable to the action of the county board, put in motion by the direct efforts of Huffaker. He has by such conduct induced action upon the part of others; he has created a condition of affairs with respect to this highway that has induced official and individual action concerning it, and he is in no situation to aver against others that what he helped to make appear had an actual existence, has no legal existence. He is estopped from asserting that this strip of ground is a legal

---

Opinion of the Court.

---

highway, and anyone who takes from him, or succeeds to his ownership of the land, is estopped to the same extent. (See cases of *Neff v. Bates*, 25 Ohio St. 169; *Turner v. Williams*, 76 Mo. 617, as tending to support this doctrine.) Again, assuming that the action of the board of county commissioners, declaring the west 60 feet of Kansas avenue a public highway is defective, yet, if the public have acted on the claim supplied by such proceedings, and have used the strip of ground as a public highway for the requisite period of time, it is established as such by presumption. (Elliott, Roads and St. 136, and authorities cited.)

It may be said—and this is one of the embarrassments of the case—that the continued user of this strip of ground is as consistent with its character as a street as that of a public highway. While this is measurably true, and would be absolutely so in the absence of the proceedings before the county board, it must be recollected that this user was coupled with certain official acts entirely inconsistent with its character as a street. It was worked and improved by the overseer of the road district, and it was treated by the township officers as a highway. Its character as a street was formed by the act of dedication, and beyond the filing of the plat there is not an affirmative word in the whole record that it was ever used as a street, but on the contrary there are many things recited that rebut the ordinary presumption that it continued to be a public street. These are, that there never was a population on the land platted sufficient to make a city, town, or village, but that such land constituted a town-site, as defined in the case of *City of Ottawa v. Rohrbough*, 42 Kas. 253, “it being a tract of land subdivided into lots and blocks by streets and alleys, that has never been improved by occupancy or buildings, or has been so partially improved, but not to the extent as would authorize the organization of a city, town, or village.” It is set forth in the agreed statement of facts “that the lands within the limits of said town-site of Quindaro have ever since said proceedings and orders above set forth been occupied and used as farming lands, and in no respect have been

occupied, used or treated as town lots for any of the purposes of a town or village." So that the strip of ground was not in use as a street at the time the county board declared it to be a public highway.

We are not unmindful of the fact that this court has several times declared that a public highway cannot be created by a resolution of the board of county commissioners, (see cases of *Noffziger v. McAllister*, 12 Kas. 315; *Comm'rs of Wabaunsee Co. v. Muhlenbacher*, 18 id. 129; *Shafer v. Weech*, 34 id. 595; *Barker v. Comm'rs of Wyandotte Co.*, 45 id. 681,) but the order of the board can be clearly referred to by the public as a claim or color of right for the use, reinforced by the fact that there has been a constant use of the same, as a public highway, for more than 14 years. In this state it was held, in the case of *Oliphant v. Comm'rs of Atchison Co.*, 18 Kas. 386, that "the use of a highway for five years vests no title in the public as against the owner." We have been unable to find a case in which the time necessary to create a highway by prescription has been expressly stated by this court. Of course 15 years' constant use would be sufficient. But this is not a very material question in this case, the precise contention now being that Huffaker's relation to this strip of ground has been such that the use by the public of it, for any length of time, is sufficient to estop him, by reason of his conduct and influence in procuring the order of the board, and, he being estopped, that estoppel operates against all those in privity with him. The old maxim of the common law, "once a highway always a highway," still holds good, so far as the rights of an abutter are concerned, and it is probable that the legislature cannot take away the rights of an abutter without at least providing for compensation; but where no such rights exist or are asserted, the public may abandon or some tribunal vacate. It is shown that this strip of land was created a street by dedication, and then it is shown that the town in which this street was located was disincorporated, or, if not legally disincorporated, that for a long series of years the land on either side of the street has been used exclusively

---

Opinion of the Court.

---

for farming purposes, and not used for any of the purposes of a city, town, or village; it is shown that it has been used as a public highway for many years, and that this user is traceable to a color of right found in the public records of the county, and acquiesced in for many years, both by the officials of the township, the adjoining owners, and the traveling public.

It seems clear to us that if the public authorities treat this strip of ground as a public road, and citizens have acquired rights on the faith that it was a road, and public money is expended on its improvement, and resident tax-payers of the road district in which it is situated are compelled to perform labor upon it, and all these things have been induced by the acts and declarations of the owner, that such owner creates an equitable estoppel, which precludes him from defeating the public right of passage, not because it has become a public road by prescription, but because the declarations and actions of the owner of the land have been such that he, in good conscience, cannot deny that it is a public road. An owner in many cases may estop himself from recovering the land itself, and yet have his action for damages. (Elliott, Roads and St., p. 3, and authorities cited in foot-notes.) And if Huffaker is estopped, those who succeed him in ownership of the land must keep silent. The plaintiff in error is either bound by the acts and declarations of Huffaker, or his levy on the land is not such an interest as permits him to disturb a condition created and acquiesced in by the public and the owner.

These considerations lead us to the conclusion that the judgment of the court below ought to be affirmed, and we so recommend.

By the Court: It is so ordered.

All the Justices concurring.

THE CHICAGO, KANSAS & NEBRASKA RAILWAY COMPANY V. JOHN T. STEWART *et al.*

- |    |     |
|----|-----|
| 47 | 704 |
| 66 | 127 |
| 47 | 704 |
| 77 | 304 |
1. CONDEMNATION PROCEEDING—*Value of Land Taken—Expert Evidence.* Where farmers or others give their opinions, as experts, as to the market value of land with which they are acquainted, it is not improper, upon cross-examination, for the purpose of testing their knowledge and competency, to inquire of them concerning the sales of adjoining land.
  2. INSTRUCTIONS, *When to be Given.* Instructions are not to be given unless applicable to the facts disclosed upon the trial.

*Error from Sumner District Court.*

CONDEMNATION PROCEEDINGS by the *Chicago, Kansas & Nebraska Railway Company* for a right-of-way through the northwest quarter of section 2, in township 32, in range 1 west, in Sumner county, in this state. The condemnation commissioners awarded the land-owners \$1,999. Both the railway company and the land-owners appealed from this award to the district court of said county. The appeals were consolidated and tried together under the title of *John T. Stewart and A. A. Richards v. The Chicago, Kansas and Nebraska Railway Company*. In the district court the land-owners filed a petition which alleged, among other things, that "the land lies near to the populous and growing city of Wellington, the county-seat of the county of Sumner; that the main public road and thoroughfare leading from the northern portion of said county to the county-seat runs along the east line of the land; and that on the 10th day of May, 1887, the land, before being invaded by the ruthless and destroying hand of the defendant, was the most beautiful, finest, and desirable tract of land in said county. It laid like a daisy, smooth as a kitten. Shimmering in the sunlight of that Kansas spring morning, nothing could be handsomer."

The jury returned a verdict for the land-owners against the

## Opinion of the Court.

railway company for \$2,330.70. They also made the following special findings of fact:

"1. From what time do you allow interest to the plaintiffs?

A. From May 10, 1887.

"2. How much do you allow the plaintiffs for interest?

A. \$230.70."

Special interrogatories numbered 1, 2, 4, 6, 15, and 16, asked by the defendant, and the answers thereto, are in the words and figures following, to wit:

"Ques. 1. What was the fair market value of the farm in question immediately before the condemnation of defendant's right-of-way over the same? Ans. \$8,000.

"Q. 2. What amount of land was there in the farm in question just before defendant's right-of-way was condemned over the same? A.  $158\frac{35}{100}$  acres."

"Q. 4. What amount of land was taken for the right-of-way of defendant? A.  $7\frac{18}{100}$  acres."

"Q. 6. What was the amount of land left on the east side of defendant's right-of-way? A.  $17\frac{7}{100}$  acres."

"Q. 15. What was the fair market value of the plaintiffs' farm immediately after the condemnation of defendant's right-of-way over plaintiffs' farm? A. \$5,900.

"Q. 16. What sum do you allow in your total estimate of damages for the perpetual use of the land taken for the defendant's right-of-way? A. \$362.73."

The *Railway Company* filed its motion for a new trial, containing 17 grounds therefor. This motion was overruled, and judgment rendered upon the verdict. The *Railway Company* excepted, and brings the case here.

*M. A. Low*, and *W. F. Evans*, for plaintiff in error.

*James Lawrence*, and *A. A. Richards*, for defendants in error.

The opinion of the court was delivered by

HORTON, C. J.: Appeal from an award made by commissioners to lay off and condemn a right-of-way for a railway company. The commissioners awarded the land-owners \$1,999. Both parties appealed. Upon the trial, the jury

returned a verdict for the land-owners against the railway company for \$2,330.70. Judgment was entered thereon. The railway company excepted, and brings the case here. Upon the trial, the railway company introduced as witnesses J. W. Morris, A. M. McConkey, and John S. McMahan, who were farmers living in the vicinity of the land in controversy, and acquainted with the value thereof. Two of these witnesses testified that the land was worth \$2,500; another of these witnesses testified the land was worth \$25 an acre. For the purpose of testing the knowledge and competency of these witnesses, the owners inquired of them, upon cross-examination, concerning the sales of adjoining land. The propriety of allowing proof of the sales of similar property to that in question, made at or about the time of the taking, is sustained by some of the authorities and opposed by others. Such proof is held competent in Illinois, Iowa, Massachusetts, New Hampshire, New York, and Wisconsin, and wholly incompetent by the courts of Pennsylvania and Minnesota. (Lewis, Em. Dom., § 443.) In a Massachusetts case it was said that—

“The price for which other adjacent lots had been actually sold was admissible, open, of course, to any evidence explanatory of the circumstances attending such sale, and tending to show why the purchasers gave a price greater than the true value of the land. If it had been a price fixed by a jury, or in any way compulsorily paid by the party, the evidence of such payment would be inadmissible before the jury. Upon the principle on which we should admit evidence of other sales between other parties of adjacent lots, this evidence was admissible, and none the less so because the railroad corporation were themselves the purchasers.” (*Wyman v. Railroad Co.*, 54 Mass. 316.)

The objections to evidence of special sales of land are stated in *East Pennsylvania Railroad v. Heister*, 40 Pa. St. 53, where the court, speaking of similar evidence received in that case, says:

“It did not pretend to fix the market value of the land, but assumed to ascertain it by the special, and it may be excep-

## Opinion of the Court.

tional, cases named. This would not do; for, if allowed, each special instance adduced on the one side must be permitted to be assailed, and its merits investigated, on the other; and thus would there be as many branching issues as instances, which, if numerous, would prolong the contest interminably. But even this is not the most serious objection. Such testimony does not disclose the public and general estimate which, in such cases, we have seen is a test of value. It would be as liable to be the result of fancy, caprice or folly as of sound judgment in regard to the intrinsic worth of the subject-matter of it, and consequently would prove nothing on the point to be investigated. The fact as to what one man may have sold or received for his property is certainly a collateral fact to an issue involving what another should receive, and, if in no way connected with it, proves nothing. It is therefore irrelevant, improper, and dangerous."

See, also, *Stinson v. C. St. P. & M. Rly. Co.*, 27 Minn. 284-289; *Railway Co. v. Splitlog*, 45 Kas. 68; *K. C. & T. Rly. Co. v. Vickroy*, 46 id. 248. In this case, however, the land-owners did not prove or offer to prove, to make out their case, any special sales of property adjoining the land in dispute. The evidence objected to was drawn out upon cross-examination, and we think, where experts or persons are permitted to give their opinions as to value of land, a cross-examination of the kind referred to is not improper, or any ground for the reversal of a case. (*K. C. & T. Rly. Co. v. Vickroy*, 46 Kas. 248.) In that case it was decided that—

"In appeals from the awards of commissioners in condemnation proceedings, opinions as to the value of property should be confined to the property in question, unless on cross-examination, for the purpose of testing the knowledge and competency of the witness, the value of adjoining property is inquired of."

The railroad company asked the court to instruct the jury—

"That in assessing the damages done to the land by reason of the appropriation of a right-of-way through it for a railroad, the liability of teams being frightened, or the additional care by the land-owner made necessary in the future as to such teams, by reason of the proximity of such railroad, does not of itself constitute any grounds for special compensation;



---

Sullivan v. Brown.

---

such damages are speculative, and not the proper subject of inquiry and damage."

This instruction was refused. Where such an instruction is applicable or necessary, it should be given. The instruction has been approved by this court in many cases. But the facts disclosed upon the trial hardly show that this instruction was needed in this case. The land in dispute consists of about 160 acres near the city of Wellington; only 10 to 15 acres at the time of the taking were broken, the remainder of the land was raw prairie, without improvements. There was no evidence offered or attempted to be offered in the case concerning teams being frightened by reason of the proximity of the railroad. The general charge to the jury seems to have been fair, and fully in accord with the decisions of this court for like cases. We do not think the refusal to give the instruction prayed for, considering the testimony offered, was prejudicial. It does not appear from any of the special findings that the liability of teams being frightened was an element in the damages returned.

The judgment of the district court will be affirmed.

All the Justices concurring.

---

CHARLES SULLIVAN *et al.* v. S. A. BROWN & Co.

**JUSTICE OF THE PEACE—Practice.** The plaintiff commenced an action before a justice of the peace upon an account duly verified under § 84 of the justices' act, and no denial of the account, verified by affidavit or otherwise, was ever interposed. The justice, in the absence of the plaintiff, sustained a motion of the defendants to dismiss the action for want of prosecution, but within five minutes thereafter and before he entered the order of dismissal upon his docket, set aside the order of dismissal and overruled the defendants' motion, and set the case down for trial at a later hour of the same day, and the defendants' attorney had full notice thereof, and the justice afterward rendered judgment in favor of the plaintiff and against the defendant for the amount of the plaintiff's account. *Held*, No material error was committed as against the defendants.

*Error from Sedgwick District Court.*

THE opinion states the case.

*Edwin White Moore*, for plaintiffs in error.

*Dale & Wall*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action commenced before a justice of the peace of Sedgwick county on November 27, 1888, by S. A. Brown & Co., a corporation, against Charles Sullivan and George Steinmetz, to recover on an account the sum of \$230. The summons was made returnable on December 8, 1888, at 9 o'clock A. M., which summons appears to have been duly served. Attachment and garnishment proceedings were also commenced at the time of commencing the action, but as no question is presented with regard to them, they will not be further mentioned in the case. We shall now give so much of the proceedings of the justice of the peace as are applicable to this case, and as they appear from the record, and as entered by the justice upon his docket. They are as follows:

"And now, to wit, on this 8th day of December, 1888, at 10 o'clock A. M., this cause comes on for hearing. The plaintiff, S. A. Brown & Co., not present, and the defendants, Charles Sullivan, George Steinmetz, by Moore & Douglass, their attorneys, present. In three minutes thereafter, and during the pressure of other official business, the defendants, by their attorney, Edwin White Moore, moved to dismiss this action for want of prosecution, and insisted upon a ruling on said motion at once, for the reason that he must be in another court immediately; and while in the act of leaving my office, and on his insisting, I sustained said motion, and said attorney withdrew at once from said office. Within five minutes, and before any entry had been made on my docket, I discovered that the account sued on was verified by the affidavit of H. L. Williamson, plaintiff's manager therein. I immediately sent word to the said attorney that I had reconsidered my rul-

---

Sullivan v. Brown.

---

ing on said motion, and had overruled the same, also at the same time sending word to plaintiff's attorneys, who were with defendants' attorney, attending upon the district court of this county, of my action, and that the case was set down, upon my own motion, for trial at 3 P. M. of this day. At or near 2 o'clock of this day said attorney Moore informed me that he had notice of my action as aforesaid, and that he had seen plaintiff's attorneys at said district court, and that he wanted until Monday of next week to consider whether he would stand upon record now made, if plaintiff's attorneys would agree to such continuance. No further appearance being made herein by either party, and on account of the pressure of other official business, I passed this case until December 10, 1888; at which time, and at 10 o'clock A. M., plaintiff's attorneys appeared for the plaintiff, and, in the absence of the defendants and their attorneys, demanded judgment for the plaintiff, stating that the defendants by their attorneys had agreed that this case should be set for hearing at 9 A. M. of this day. Whereupon the hearing is had, the correctness of plaintiff's verified account still not denied under oath by the defendants. And on hearing the proofs and allegations of parties, I do find for the plaintiff, in the sum of \$222.75, of which \$22.75 is for 7 per cent. interest on \$200, from April 25, 1887. It is thereupon, on this 10th day of December, 1888, considered, ordered and adjudged by the court, that the said S. A. Brown & Co., plaintiff, have and recover of the said Charles Sullivan and George Steinmetz, defendants, the sum of \$222.75, with 7 per cent. interest per annum from date, together with costs herein, taxed at \$6.40. December 10, 1888, at or near 11 o'clock A. M., Edwin White Moore, one of the defendants' attorneys herein, appeared and protested that he had not agreed with plaintiff's attorneys that this case should be set down for hearing at 9 o'clock A. M. of this day, and objected to the entering of any judgment herein, and also excepted to the ruling of the justice in reconsidering and then overruling of this said motion heretofore made, to dismiss this action for want of prosecution on the part of the plaintiffs, last Saturday, December 8, 1888."

On December 15, 1888, the defendants took the case to the district court upon petition in error, and on April 2, 1889, the case was dismissed by the district court, and judgment for costs was rendered in favor of S. A. Brown & Co. and against Sullivan and Steinmetz; and afterward Sullivan and Stein-

metz brought the case to this court on petition in error, making S. A. Brown & Co. the defendant in error.

Did the district court commit material or substantial error in dismissing Sullivan and Steinmetz's petition in error? It appears that the bill of particulars of the plaintiff in the justice's court set forth a cause of action upon an account, and was duly verified, and no denial of this account, verified by the affidavit of the opposite party or of anyone else, and indeed no denial of any kind, was ever made or presented to the justice of the peace, and no testimony was introduced before the justice; hence, the only action that the justice could properly have taken in the matter was to render judgment in favor of the plaintiff in his court and against the defendant for the amount of the account. (Justices' Code, § 84; *S. K. Rly. Co. v. Gould*, 44 Kas. 68.) At the time, however, when this case came up for consideration in the justice's court, the justice was engaged in other official business, and could not properly have taken up the case at all for consideration. However, the justice was pressed by the defendants to dismiss the plaintiff's action for want of prosecution, and the justice sustained the defendants' motion, but never made any entry thereof upon his docket, and within about five minutes thereafter overruled the defendants' motion and set the case down for trial at 3 o'clock P. M. of the same day, and the defendants' attorney had full notice thereof. Now, under the pleadings and proceedings in the justice's court, as the justice had no power to act except to render judgment in favor of the plaintiff in that court, and against the defendants for the amount of the account, and as the order sustaining the defendants' motion to dismiss the action was never entered upon the justice's docket, and as such order was set aside and the motion overruled in a few minutes after they were made, and as the attorneys for the defendants had full notice of the same, we think we cannot treat the subsequent proceedings of the justice as void; and as the justice on December 10, 1888, rendered the only proper judgment that could ever have been rendered in the case under the pleadings and proceedings, we think such judg-

---

A. T. & S. F. Rld. Co. v. City of Atchison.

---

ment ought to have been affirmed by the district court. And therefore, as the judgment of the justice of the peace ought to have been affirmed, it was certainly not material error, as against the defendants in the justice's court, plaintiffs in error in the district court and in this court, for the district court to dismiss such parties' petition in error.

Hence the judgment of the district court will be affirmed.

All the Justices concurring.

---

47 712  
47 726

THE ATCHISON, TOPEKA & SANTA FÉ RAILROAD COMPANY V. THE CITY OF ATCHISON *et al.*

1. **SECTARIAN COLLEGES—Void Tax.** There is no power in the officers of a city to subscribe public money in aid of private, sectarian colleges, and a tax levied on property within the city for that purpose is void.
2. **ILLEGAL TAX—Involuntary Payment—Recovery.** *K. P. Rty. Co. v. Comm'rs of Wyandotte Co.*, 16 Kas. 587, and *A. T. & S. F. Rld. Co. v. Comm'rs of Atchison Co.*, *infra*, followed, holding that a portion of the illegal tax was paid by plaintiff under such circumstances as to be an involuntary payment, which may be recovered back.

*Error from Atchison District Court.*

ACTION by the *Atchison, Topeka & Santa Fé Railroad Company* against the *City of Atchison*, *T. J. Emlen*, as treasurer of Atchison county, and *T. J. Emlen*, to recover certain taxes paid. Judgment for defendants on demurrer to the petition. Plaintiff brings error.

*Geo. R. Peck*, *A. A. Hurd*, and *Robert Dunlap*, for plaintiff in error.

*W. D. Gilbert*, city attorney, for defendant in error the City of Atchison; *W. T. Bland*, county attorney, for defendants in error other than the City of Atchison.

The opinion of the court was delivered by

JOHNSTON, J.: This was an action brought by the railroad company against the city of Atchison, T. J. Emlen, county treasurer of Atchison county, and T. J. Emlen, to recover certain taxes claimed to be illegally paid, amounting to the sum of \$264.55, with interest thereon at 7 per cent. from December 20, 1887. In its petition plaintiff alleged, among other things, that in the year 1887 it was the owner of personal property in the city of Atchison and a tax-payer of Atchison county; that in that year the city of Atchison, by its mayor and council, levied a tax of  $10\frac{3}{4}$  mills on the dollar on the personal property of plaintiff assessed in the city to pay one-half of a subscription made by the city in the sum of \$50,000 for the benefit of Midland College, and also to pay one-half of a subscription of \$50,000 made by the city for the benefit of St. Louis College, and that both of these colleges were and are private and sectarian institutions, and not public schools and colleges; that the levy and tax therefrom, amounting to \$271.33, was charged against the personal property of the plaintiff on the tax-roll of the county for the year 1887; and that the defendant treasurer proceeded to collect this illegal tax, the same as other taxes. It is further alleged, that between the 16th and the 20th days of December, 1887, the plaintiff was desirous of paying the full amount of all taxes legally due from it, and notified the county treasurer that the tax of \$271.33 for the colleges was illegal and unauthorized, and protested against the payment of the same; but the treasurer declined and refused to receipt in full for the taxes on plaintiff's property unless the plaintiff should pay the illegal tax, less the usual rebate; and the plaintiff thereupon, although protesting, paid to the treasurer the sum of \$264.55, in order to avoid the issue of legal process for its collection. And it is further alleged that if it had not so paid the illegal tax, the county treasurer would have issued his warrant to the sheriff of the county for its collection, and the property of the plaintiff would have been levied upon and sold under the forms of

law. The protest against paying this tax was in writing, and is as follows:

"The Atchison, Topeka & Santa Fé Railroad Company hereby notifies you that the amount legally due by said company as tax on the personal property in your county for the year 1886 does not exceed the sum of \$5,799.38, which sum you have refused to receive; and that said company pays the sum of \$264.55 demanded by you, protesting against the illegality thereof, and solely to avoid the issue of legal process for its collection. And said company further notifies you, that it will hold you and your county liable for the excess above the amount legally due; that you are not to disburse or part with such excess, and that said company will sue you and said county for its recovery.

"Dated this 16th day of December, 1887."

Upon the demurrer of the defendants, the district court held that the petition did not allege a cause of action; and the plaintiff standing upon its petition, judgment was given in favor of the defendants.

No argument is required to show the invalidity of the tax. Of course the public is interested in education, and taxes may be authorized and properly levied for the maintenance of public institutions of learning; but in this case the subscription and levy were for private and sectarian institutions. We are concluded by the statements in the petition as to the character of the colleges proposed to be aided by the city. The demurrer admits that they are not public schools or colleges, such as can be maintained by money drawn from the public treasury. While it is argued that the public is benefited by the increase of schools and the spread of learning and knowledge, it is not contended that the colleges in question are under the supervision and control of the public, or that there is or could be any legislative authority to expend the public revenues for their support. The officers of the city had no power to impose a tax on the property of the citi-

1. Private, sectarian schools; void tax.

zens of Atchison to aid private, sectarian schools, or to promote private interests and enterprises. (*Loan Association v. Topeka*, 20 Wall. 655.)

## Dissenting Opinion.

The district court appears to have held the tax to be void, but that the payment of the same by the plaintiff was voluntary, and therefore not recoverable. The facts stated in the petition bring the case within the rule announced long ago in

*K. P. Rly. Co. v. Comm'rs of Wyandotte Co.*, 16 Kas. 596, and which has been followed in *A. T. & S. F. Rld. Co. v. Comm'rs of Atchison Co.*, *infra*.

Under the Wyandotte case, the argument and reasoning of which it is unnecessary to repeat, the first half of the illegal tax which was required to be paid may be recovered back; but the second half was an optional payment, made to secure a rebate, and is not recoverable. The demurrer should have been overruled, and for the error in sustaining the same the judgment will be reversed, and the cause remanded for a new trial.

HORTON, C. J., concurring.

VALENTINE, J.: In my opinion, the decision of the court below was and is entirely correct. While I concur with the majority of the members of this court in holding that the tax in dispute is illegal and void, yet I dissent from their opinion holding that such tax was paid by the plaintiff under compulsion and involuntarily. The tax was paid on December 17, 1887; therefore, presumably, it was levied in August, 1887, and was placed on the tax-roll some time between that time and November 1, 1887; and on November 1, 1887, the tax-roll was placed in the hands of the county treasurer for collection; and on December 17, 1887, the plaintiff paid the tax; and during all that time, from August up to December 17, 1887, the plaintiff had ample opportunity to commence an action to test the validity of the tax; but it did not do so. And why did it pay the same at that particular time and without any contest? It is suggested that a penalty might have been added after December 20, if the tax had not been paid prior thereto; but this could not affect the plaintiff's rights. A valid penalty could never be added to a void tax. The penalty would be as void as the tax itself, and no lapse



---

A. T. & S. F. Rld. Co. v. City of Atchison.

---

of time nor anything else could ever make either the void tax or the void penalty valid. The plaintiff could at any time have avoided both. It is also suggested that a warrant for the collection of the tax might have been issued by the treasurer. Now it would be illegal and wrongful for the treasurer at any time to do so; and why must it be supposed that he might have committed such wrongful and illegal act? But suppose he might have done so: still, it must not be supposed that he would have done so until after January 10, 1888; for a county treasurer cannot, under any circumstances nor in any case, issue a legal tax warrant for delinquent taxes until after January 10. (Tax Law, § 92; Gen. Stat. of 1889, ¶ 6941.) Hence the plaintiff was under no possible compulsion to pay the tax when it paid the same, nor could it have been until after January 10, 1888—more than 24 days thereafter. The rule governing in such cases is stated in the case of *Wabaunsee Co. v. Walker*, 8 Kas. 431, 436, as follows:

“Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed to be voluntary, and cannot be recovered back. And the fact that the party at the time of making the payment files a written protest does not make the payment involuntary.”

This rule has been quoted approvingly and followed twice by the supreme court of the United States. (*Lamborn v. Co. Commissioners*, 97 U. S. 181, 186, 187; *Railroad Co. v. Commissioners*, 98 id. 541, 543, 544.) In the first case Mr. Justice Bradley delivered the opinion of the court. The case was thoroughly considered and many cases cited, among them the case of *K. P. Rly. Co. v. Comm'rs of Wyandotte Co.*, 16 Kas. 587, which was cited and considered, but not followed, except so far as it supported the decision reported in 8 Kas. 431. The case reported in 98 U. S. was on error from the United States circuit court for the district of Nebraska. That case was also thoroughly considered. The opinion therein was de-

## Dissenting Opinion.

livered by Chief Justice Waite, who, in delivering the opinion of the court, after quoting the rule enunciated in the 8th Kansas Report, then used the following language: "This, as we understand it, is a correct statement of the rule of the common law." (98 U. S. 543, 544.) See also *Phillips v. Jefferson Co.*, 5 Kas. 412, 416, *et seq.*; *Sapp v. Comm'rs of Brown Co.*, 20 id. 243, 245.

Possibly the rule as enunciated in the 8th Kansas Report and also in the 97th and 98th United States Reports is wrong, but I do not think so. The case reported in the 8th Kansas (*Wabaunsee Co. v. Walker*) was decided more than 20 years ago, and the rule there enunciated has never since been overruled or questioned or doubted by this court, unless by the merest of implications; but, on the contrary, it has been reiterated and confirmed in other decisions, and especially in the case of *K. P. Rly. Co. v. Comm'rs of Wyandotte Co.*, 16 Kas. 587, 597, where the rule enunciated in the 8th Kansas Report is quoted; and a statement is then made in the opinion of the court as follows: "We see no reason to doubt the correctness of the rule as thus stated." (16 Kas. 597.) The rule is also quoted as law in the syllabus of that case. (16 Kas. 587.) Now, after the rule has existed in Kansas for more than 20 years, being announced by the supreme court of Kansas in 1871, (8 Kas. 431,) reiterated by the same court in another case in 1876, (16 Kas. 587,) and subsequently followed by the court in still other cases, (20 Kas. 245; 22 id. 389, 398, 399,) has it not had an existence long enough in Kansas to be considered as settled and established, or must it now be overturned and destroyed? The rule, however, was really announced in Kansas in 1870. (*Phillips v. Jefferson Co.*, 5 Kas. 412.) But suppose that when the plaintiff paid this illegal and void tax, which it was not bound at all to pay, a cause of action accrued in favor of the plaintiff: then against whom did the cause of action accrue? Was it the county treasurer who received the money, or the county clerk who placed the tax on the tax-roll, or the county of Atchison, or the city of Atchison, or the Midland College, for whose benefit the tax was levied and col-

lected? Or was it some other person or corporation or body, public or private, or all severally and collectively? And if a cause of action accrued in favor of the plaintiff and against somebody, did any statute of limitations commence to run against such cause of action? And if so, then what statute of limitations—a statute giving two years or three years, or some greater period of time within which to commence the action? How long would this cause of action stand as a valid and existing liability impending over one or more or all of the foregoing parties? In closing, I might say that if the plaintiff had tendered to the county treasurer all the valid taxes standing against it, and had kept the tender good, no valid penalty could ever afterward have been added to any one of such taxes, nor could any valid warrant have ever afterward been issued for their collection; and void penalties and void warrants could in any case easily be defeated.

HORTON, C. J.: I concur in the reversal of the judgment of the district court, but on account of the dissent filed I add a few words. It was decided by this court in 1876, about 16 years ago, in the case of *K. P. Rly. Co. v. Comm'rs of Wyandotte Co.*, 16 Kas. 587, as stated in the syllabus, that—

“Where all steps for determining the amount of a tax upon personal property have been taken, the tax-roll is complete and in the treasurer's hands, the taxes due, and it is made the duty of the treasurer at a specified date to issue a warrant to the sheriff to collect all unpaid taxes on personal property, and the duty of the sheriff within 60 days thereafter to levy upon and sell sufficient personal property to pay such taxes, penalty, and costs, and no discretion is given to anyone to change the amount of the tax or the time or manner of its collection, a payment to the treasurer of the tax, protesting its illegality, declaring that payment is made solely to avoid the issue of process, and asserting an intention to sue for the sum illegally paid, should be considered an involuntary payment—one made to prevent an immediate seizure of the taxpayer's property, although such payment was made 17 days before the time fixed for the treasurer to issue his warrant.”

---

Concurring Opinion.

---

In support of this part of the syllabus of the case, Mr. Justice BREWER, in the opinion, said :

“But here no warrant has issued. None could legally issue for 17 days, nor could the company’s property be in any manner disturbed before that time—so that there was no danger of instantaneous seizure. On the other hand, there was no further inquiry to be made by the officer or tribunal. The amount of the tax was fixed beyond any opportunity for review. There was no discretion with anyone as to whether a warrant should or should not issue, a levy should or should not be made. The machinery for adjusting the amount of the tax had completed its work, and was at rest; only the machinery for collecting was in motion, and it moved with the certainty of fate and the rapidity of time to the finality of seizure and sale. Where the law is imperative, and, giving no discretion, commands the issue of the warrant at a definite time, and the levy under that warrant within a fixed time thereafter, must an individual wait until the last moment, and pay only just as the officer is seizing his property, or may he assume that the officers of the law will obey its precepts, and, when all opportunity for consideration, correction and change has passed, all discretion ended, and the tax-roll is in the treasurer’s hands, waiting only the lapse of a few days to ripen into a warrant and seizure, may he not then pay to the treasurer, protesting against the legality, and asserting his intention to contest? Does he not then pay to prevent an immediate seizure, one that is certainly and presently impending? Wherein does the state suffer wrong, or what advantage does it lose by holding that to be an involuntary payment? . . . It seems to us, then, that according to a fair and reasonable interpretation of the rule, the railway company paid this first half of the tax under such circumstances that it should be considered an involuntary payment. It was to prevent a seizure as certainly impending as the law could make it, and one also presently impending. It may be remarked that the entire personal tax was levied and assessed as one tax. The law simply divided the time of payment, requiring one-half to be paid in December, and permitting the other to remain until the June following, so that if more than the one-half was paid in December, there would be some show of reason in holding that it might be corrected when the last half of the same tax was to be paid.”

This decision was subsequent to the decision of *Wabaunsee*

*Co. v. Walker*, 8 Kas. 431, rendered by this court in 1871, and if it differs or modifies that decision in any way, the decision in the Wyandotte county case must be considered as the law of this state, as interpreted by its highest legal tribunal, rather than the earlier decision. The decision in the Wyandotte county case very clearly and properly construes the old case of *Wabaunsee Co. v. Walker*, 8 Kas. 436, and ever since that decision the construction so given it by the court in the declaration of the law as announced in the fifth proposition of the syllabus thereof, has been the rule in this state in such cases, and is very justly the rule now. Further, this decision has remained unchallenged and unchanged ever since 1876. In this particular case, it appears that the plaintiff "used the Wyandotte case as a guide for its action" and paid its money upon the rule therein stated. It would be grossly unjust if a party, acting upon the law as interpreted by the supreme court of this state, should pay his money according to the express provisions of a decision, and then be gravely informed by a subsequent decision, after he had so acted, and parted with his money, that the law was exactly contrary to that previously declared by this court. "I suppose it might be considered as a kind of legal axiom, that courts should not exercise their jurisdiction in any random manner, for this would speedily land everything in 'confusion worse confounded.'" (Wells, Res. Adj. 541.) The New York court, speaking of the maxim *stare decisis et non quieta movere*, says: "The decisions of this court, while unreversed, always form the absolute law of the cases, and enter, with very decisive effect, into the body of precedents." (*Bates v. Relyea*, 23 Wend. 340.)

"When once a principle has been fully recognized, it should not be changed, except it is found to be unbearably wrong, or else it is changed or abrogated by the legislature, (*Lemp v. Hastings*, 4 G. Greene, 449,) to whom the correction of errors ought usually to be left as to long-established principles acted upon as a rule of property." (*Emerson v. Atwater*, 7 Mich. 23.) "The rule of *stare decisis*, so far as it applies to decisions of our own court, should not be disregarded, but on the fullest

---

Concurring Opinion.

---

conviction that the law had been settled wrong, and, even then, we should pause and consider how far the reversal would affect transactions entered into and acted upon under the law of the court." (*Sydner v. Gascoigne*, 11 Tex. 455; see, also, *Ewing v. Ewing*, 24 Ind. 470.)

In *Giblin v. Jordan*, 6 Cal. 418, it is said that "A rule once established and firmly adhered to may work apparent hardship in a few cases, but in the end will have more beneficial effect than if constantly deviated from." And again: "Courts are permitted to exercise a wide discretion, and judges are not expected, or required, to overturn principles which have been considered and acted upon as correct, thereby disturbing contracts and property, and involving everything in inextricable confusion, simply because some abstract principle of law has been incorrectly established in the outset. The books are full of cases in which learned judges have acknowledged the errors committed by themselves, or their predecessors, and at the same time refused to overthrow the rule established."

Even, however, if this court were not bound by the decision in the Wyandotte county case, in 16 Kas. 587, upon the maxim of *stare decisis*, (which I think it is,) yet the rule adopted in the fourth proposition of the syllabus of that case is so reasonable, fair and just that it ought to be the law, not only in this state, but in every other state. A tax-payer in Kansas ordinarily has sufficiently heavy burdens to bear when he promptly pays or tenders all taxes lawfully levied against him or upon his property, without being compelled to go into a court of equity in the first instance to prevent the collection of unjust and illegal exactions, made without any authority of law, and in violation of the constitution of the state. The law declared by the court below and favored in the dissenting opinion, although sustained by very many able and respectable courts, is unjust, harsh, and, in my opinion, without any good reason for its support. Of all the powers conferred by the state upon cities, that of taxation is most often abused, and courts ought not to favor such abuse by throwing around the attempted collection of unjust, illegal and unconstitutional taxes such protec-

tion as will doubly burden the tax-payer, by requiring of him the expenditure of large sums of money as attorney fees in a court of equity to protect his rights from such illegal and unconstitutional exactions, when he tenders all legal taxes in due time, and, after pointing out the special taxes or exactions which are unjust, illegal, and unconstitutional, objects and protests against their collection.

A payment of illegal and unconstitutional exactions, under such objection and protest, is not in any fair sense free and voluntary.

**THE ATCHISON, TOPEKA & SANTA FÉ RAILROAD COMPANY V. THE BOARD OF COMMISSIONERS OF ATCHISON COUNTY *et al.***

1. **COUNTY BRIDGE—Tax—Void Levy.** The levy of a 1-mill tax for building county bridges, the cost of which is payable out of the fund provided for the current expenses of the county, where the levy for county expenses is already up to the limit allowed by statute, is unauthorized and void.
2. **TAX—Involuntary Payment.** The case of *K. P. Rly. Co. v. Comm'rs of Wyandotte Co.*, 16 Kas. 587, followed, holding that the first half of the illegal tax paid by plaintiff on December 17, the treasurer refusing to receive or to receipt for any tax unless the illegal portion was also paid, and where the plaintiff protested against the illegality, and stated that the payment was made solely to avoid the issue of process, and gave notice that an action would be brought to recover that which was illegally exacted, should be considered an involuntary payment.

*Error from Atchison District Court.*

**ACTION** by the *Atchison, Topeka & Santa Fé Railroad Company* against the *Board of Commissioners of Atchison County*, the county treasurer, and *T. J. Emlen*, to recover money illegally exacted as taxes. Judgment for defendants on demurrer to the petition. Plaintiff brings error.

47 722  
47 715

*Geo. R. Peck, A. A. Hurd, and Robert Dunlap*, for plaintiff in error.

*W. T. Bland*, county attorney, for defendants in error.

The opinion of the court was delivered by

JOHNSTON, J.: This action was brought by the railroad company against the board of county commissioners of Atchison county, the county treasurer, and T. J. Emlen, to recover \$184.34, alleged to have been illegally exacted from the company as taxes. The petition alleged that the company owned and operated a line of railroad through Atchison county in the year 1886; that its property was assessed in the sum of \$189,067; and that a levy was made upon the property of 1 mill on the dollar for county bridge tax, which was in addition to the levy of 10 mills on the dollar made that year for current expenses. It was further alleged that the levy of 1 mill for county bridge purposes was not authorized by a vote of the people, or by law, and was excessive, illegal, and void. It was further stated that T. J. Emlen, the county treasurer, proceeded to collect the tax from the plaintiff on December 17, 1886, and the plaintiff, being desirous of paying the full amount of all taxes legally due from it in the said county, notified the treasurer in writing that the sum of \$189.06 was illegal, and protested against the payment thereof on account of the illegality; that the plaintiff paid all legal taxes then due from it to the county, but the treasurer refused to give his receipt in full for the taxes due unless the plaintiff should also pay the illegal tax, less the amount of rebate allowed by law. It is then alleged that "the plaintiff, protesting as aforesaid, involuntarily, and under immediate and urgent necessity, paid to said treasurer the sum of \$184.34 for such illegal taxes, being the amount of \$189.06, less the rebate allowed by law, \$4.72, and plaintiff made such payment solely to avoid the issue of legal process for its collection." The protest referred to is as follows:

"The Atchison, Topeka & Santa Fé Railroad Company



---

A. T. & S. F. Rld. Co. v. Comm'rs of Atchison Co.

---

hereby notifies you that the amount legally due by said company as tax on the personal property in your county for the year 1886 does not exceed the sum of \$6,428.33, which sum you have refused to receive; and that said company pays the sum of \$222.48 demanded by you, protesting against the illegality thereof, and solely to avoid the issue of legal process for its collection.

"And said company further notifies you, that it will hold you and your county liable for the excess above the amount legally due; that you are not to disburse or part with such excess, and that said company will sue you and said county for its recovery.

"Dated this 17th day of December, 1886."

The defendants jointly demurred to the plaintiff's petition, and the demurrer was sustained, upon the ground that the petition did not state facts sufficient to constitute a cause of action. The plaintiff standing upon its petition, the action was dismissed by the court; and of these rulings the plaintiff complains.

According to the allegations of the plaintiff, the bridge tax was unauthorized and illegal. The cost of the bridge is not stated; but if it was less than \$200, no appropriation could be made by the board; if more than \$2,000 was to be expended, an affirmative vote of the people was necessary, which was not given; and if less than \$2,000 and more than \$200 was to be expended, payment must be made out of the fund provided for the current expenses of the county. (Gen. Stat. of 1889, §§ 502, 507, 513.) In this case, the county undertook to make payment under the latter provision, and out of the county fund, without a vote having been had authorizing it, and when the levy for bridge purposes was in excess of that authorized by law. Already there had been levied 10 mills on the dollar for the current expenses of the county; and this being the full limit authorized for that purpose, the added mill tax for bridge purposes must be held excessive and void. (*A. T. & S. F. Rld. Co. v. Wilhelm*, 33 Kas. 206.)

It is contended that the tax, although illegal, was paid voluntarily, and under such circumstances that it cannot be re-

---

Opinion of the Court.

---

covered back. Payment was made on the 17th of December, when the plaintiff endeavored to pay the legal taxes charged against it, but the county treasurer refused to accept any sum unless the illegal tax was also paid. A written protest was made by the plaintiff, which pointed out the amount legally due, and gave notice that payment of the illegal portion was only made to avoid the issue of legal process to collect it; and further, that an action would be brought to recover the excess. Under the reasoning and authority of *K. P. Rly. Co. v. Comm'rs of Wyandotte Co.*, 16 Kas. 587, the payment was involuntary as to one-half of the taxes that were paid. The allegation with reference to payment of the illegal tax, as well as the protest and notice, is substantially the same in this case as in the Wyandotte case. The plaintiff in this case seems to have, "used the Wyandotte case as a guide for its action;" and, following the rule there announced — the argument to sustain which it is unnecessary to repeat — we are compelled to hold that the December payment, or one-half of the taxes charged and payable on or before the 20th of December, is recoverable. The payment of the remaining half, however, cannot be held to be voluntary. The plaintiff was not compelled to pay more than one-half of the taxes prior to December 20. It was optional with it to pay the whole or the half. By paying the whole of the taxes before December 20, it received a rebate of 5 per cent. on the amount charged against it. The advanced payment so made to obtain a discount or a rebate was for its own benefit, and as no compulsory process could have been issued nor any legal steps taken to collect the tax until the following June, the payment of the June half of the taxes in December is voluntary, and cannot be recovered. The ruling of the district court, however, denied the right of recovering any portion of the taxes, and for that reason its judgment must be reversed, and the cause remanded for a new trial.

HORTON, C. J.: I concur in the foregoing opinion and judgment rendered by this court, and for my reasons I refer

---

The State v. Tuchman.

---

to my concurring opinion in the case of *A. T. & S. F. Rld. Co. v. City of Atchison*, just decided.

VALENTINE, J.: For the reasons stated in the foregoing case of *A. T. & S. F. Rld. Co. v. City of Atchison*, just decided, I think the decision of the district court was correct and the decision rendered by this court is erroneous, and therefore I dissent in this case as well as in that.

---

THE STATE OF KANSAS V. BERNARD TUCHMAN.

1. INTOXICATING LIQUORS—*Illegal Sales—Prosecution—Waiver of Defects.* Where a criminal warrant is issued upon an information charging the defendant with the unlawful sale of intoxicating liquor, and the defendant, without at first making any objection to the sufficiency of the warrant or the sufficiency of the verification of the information, files a sworn petition for a removal of the cause to the circuit court of the United States for the district of Kansas in which verified petition he seeks to justify his illegal sales as those of original packages, made by him as resident agent for non-resident proprietors, he waives any supposed defects or irregularities in the issuance of the warrant, and cannot for that reason afterward have the warrant quashed or set aside on his motion. (The case of *The State v. Longton*, 35 Kas. 375, cited and followed.)
2. ERRORS OF LAW—*Waiver.* Errors of law occurring at the trial must be assigned for cause in a motion for a new trial, and if this is not done this court will not pass upon them.

*Appeal from Shawnee District Court.*

PROSECUTION for the illegal sale of intoxicating liquor. From a judgment of conviction the defendant, *Tuchman*, appeals. The opinion states the facts.

*David Overmyer*, for appellant.

*John N. Ives*, attorney general, and *R. B. Welch*, county attorney, for The State.

Opinion by SIMPSON, C.: The defendant was charged by information with the illegal sale of intoxicating liquor. The information contained 10 counts, and at the April term, 1891, he was convicted on the first and second counts, sentenced to confinement in the county jail for 30 days on each count, and to pay a fine of \$350 on each count, and to pay the costs of prosecution. From this judgment of conviction he appeals. Many errors are assigned, and we will notice the principal ones.

I. The first serious question occurs on the motion to quash the warrant. This motion is based upon these contentions: First, that the information is verified by the county attorney on information and belief only; second, that the sworn statements of the witnesses taken by the county attorney under ¶ 2543, General Statutes of 1889, were not filed "together" with this information; third, assuming that the sworn statements and information were filed "together," there is no oath or affirmation of any person that the defendant "had no permit to sell," and this is a necessary element of the offense and an indispensable allegation. The information is so verified, but the county attorney states in his verification that "this information is based upon the affidavits filed herewith." The precise facts disclosed by the record as to the filing of the sworn statements are as follows: The county attorney produced before the court certain documents in writing, in the nature of records of the examination of witnesses by said county attorney, and the county attorney informed the court orally, (and his statement is accepted as true by the defendant,) that these documents, so far as they refer to the defendant, were the oaths intended to support the information. Said documents were filed on the same date as the information. At the time said documents were filed the county attorney took them into the office of the clerk of the district court, and, after swearing to the information and belief, he said to the clerk, "I file these affidavits with the information." He then, within a few minutes, filed other informations, against

---

The State v. Tuchman.

---

other persons, saying to the clerk, "I file each of these affidavits [being the identical documents above referred to] with each of these informations" [referring to the above-described affidavits], and said clerk entered each of said affidavits on the appearance docket of said court in each of said causes as filed therein. The first of these affidavits contains the evidence of one Mitchell, accusing the defendant's father of making two illegal sales of intoxicating liquor. The second is the affidavit of one Barnes, who accuses one Hayslip of illegal sales. These affidavits are indorsed "*The State v. Benjamin Tuchman, The State v. Al. Hayslip.*" The third is the affidavit of G. W. Long, who charges Bernstine Bros. with two sales and this defendant with one sale. This is indorsed, "*The State v. Bernstine, The State v. Benj. Tuchman, The State v. Sicher.*" Some 10 or 11 affidavits were filed, showing violations of the law by this defendant, by Bernstine, Hayslip, Rahrer, and others, all certified to by the county attorney as being taken in pursuance of the statute authorizing these proceedings. These statements were indorsed as above described and filed with the clerk. We do not understand that it is claimed that they were inclosed in the same envelope or cover that contained the information, nor were they numbered corresponding with the number of the criminal case upon the appearance docket. The language of the statute is, that "such statement must be filed together with the complaint or information."

From this state of facts it is contended, that there was no proper filing of the statements, and hence that the information is unsupported by an oath or affirmation. It is said also, in support of the motion to quash the information, that, assuming the sworn statements were filed together with the information, still, as they did not charge that the defendant had no permit, but were entirely silent on that subject, that a material allegation was not supported by oath. The court is of opinion, however, that as the defendant, before filing his motion to quash the warrant, filed a petition to remove the cause to the circuit court of the United States for the district of Kansas,

## Opinion of the Court.

which petition was verified by the oath of the defendant, and in which he states—

“That it is the equal civil right of all persons within the jurisdiction of the United States to sell, barter, and give away, in any state of these United States, intoxicating liquor in the original package in which the same shall have been imported into any such state from another state, and was so at the date of said alleged acts in the information charged; that said equal civil right is secured by law, to wit, the constitution of the United States, the supreme law of the land. And your petitioner avows upon his oath that he has not at any time sold, bartered or given away intoxicating liquor at said county and state except in the original packages, as aforesaid, in which the same was imported into the state of Kansas from the state of Missouri, and then only as the agent in Kansas for parties resident and doing business in the state of Missouri. And he alleges that he has a clear right to do this, which right was and is guaranteed to him by the constitution of the United States as aforesaid; that said right is denied him by the law of said state of Kansas, and he cannot enforce said right, and the same is denied to him in the judicial tribunals of the state of Kansas; that the supreme court of said state of Kansas has upheld and sustained said statute of Kansas, wherein by its terms it denies to petitioner his said right so secured to him by the constitution of the United States; that this court, to wit, the district court of Shawnee county, is bound by the said decision of the supreme court of Kansas, and thus your petitioner is denied and cannot enforce in the judicial tribunals of the state of Kansas his said right.

“Wherefore he prays that this cause be removed for trial into the next circuit court of the United States for the district of Kansas, to wit, at the June, 1891, term thereof, at Leavenworth, Kansas, and he demands that upon the filing of this, his petition, all further proceedings in this cause in this honorable court shall cease.”

That his motion to quash the warrant was not in time, however strong the reasons for sustaining said motion may be.

In the case of *The State v. Blackman*, 32 Kas. 615, this court says:

“An information or complaint under the prohibitory liquor law, verified in accordance with § 12 of such law, (now ¶ 2543, Gen. Stat. of 1889,) is, so far as the verification is concerned,

---

The State v. Tushman.

---

sufficient for every purpose except merely for the purpose of issuing a warrant for the arrest of the defendant. Such an information thus verified may properly be filed by the county attorney; a trial may be properly had thereon; a conviction may properly follow the trial; and the defendant may properly be sentenced upon such conviction. Of course, before a warrant is issued for the arrest of the defendant, an oath or affirmation within the meaning of § 15 of the bill of rights should be made, showing probable cause to believe the defendant guilty; but if no such oath or affirmation is made or filed, but nevertheless the defendant without objection pleads to the merits of the action and goes to trial, he waives all irregularities in the verification of the information, and cannot afterward be heard to question the regularity or validity of any proceeding in the case, if he urges no other objection than that such verification is insufficient."

In the two cases of *The State v. Bjorkland* and *The State v. Iseman*, 34 Kas. 377, motions were made to set aside the warrants on the ground that they were improvidently issued, but this court says:

"At the time these motions were made the warrants had spent their force. So to speak, each warrant was *functus officio*. Before the filing of these motions, each of the appellants had entered into a recognizance to personally be and appear before the district court to answer the charges contained in the information filed against him, and had also waived arraignment and pleaded not guilty to the said charges. Thereby each of the appellants submitted to the jurisdiction of the court, and answered the information on file against him. It is true that subsequently the court permitted the appellants to withdraw their pleas of not guilty, and thereafter motions were made to quash the warrants and discharge the appellants; but these motions were too late, because, when made, the parties were no longer held upon the warrants."

In the case of *The State v. Longton*, 35 Kas. 375, one feature of the same question that we are discussing was presented. The information was verified by the county attorney on information and belief, and by the positive affidavit of another person, filed with the information, of all the material allegations, except that the defendant made the unlawful sales com-

---

Opinion of the Court.

---

plained of "without first taking out and having a permit therefor." On the day of the arrest the defendant entered into a recognizance for his appearance at court to answer the charge. When the case was called for trial, the defendant filed a motion to set aside and quash the warrant for the reason above stated. The defendant was then arraigned but refused to plead, and the plea "Not guilty" was entered for him. At the trial he was found guilty on one count of the information, and not guilty as to the other. On this state of facts this court says, in reviewing the case on appeal:

"We think when the defendant entered into a recognizance for his appearance at court, without making any objection to the sufficiency of the warrant, or the sufficiency of the information, or the sufficiency of the verification thereof, he waived the supposed defects in the verification of the information and the irregularity in issuing the warrant without a sufficient verification."

The only respect in which the case we are considering differs from that of *The State v. Longton* is, that in this a petition for removal was filed before the motion attacking the warrant was made, and in the reported case a recognizance was given before a similar motion was filed. It would seem, however, that a petition for removal sworn to by the appellant, in which he recites acts that, beyond all question, show him to have been guilty of the offenses with which he is charged in the information, is a much stronger and more conclusive waiver of the supposed defects in the verification of the information than entering into a recognizance for his appearance at court. The statements of guilt made in the petition for removal, being under oath, are abundantly sufficient of themselves to support a warrant. They not only show probable cause, but for such purposes are as conclusive of guilt as a formal plea of guilty on an arraignment. It must be held that his voluntary appearance, and his filing of a petition for removal, and the statements of his guilt contained in that petition, verified by himself, cure any supposed defect in the issuance of the warrant, and that after these things had oc-



curred it was too late to raise the question of the sufficiency of the warrant by a motion to quash. This view disposes of all contention about the filing of the statements of witnesses, or about the verification of the information, and renders it unnecessary to consider the constitutionality of those sections of the law that authorize the county attorney to subpoena witnesses and take their testimony.

II. Another important question is discussed under the showing in the record. This cause was submitted to the court for trial on an agreed statement of facts, which reads as follows:

"Comes now the plaintiff by R. B. Welch, county attorney of Shawnee county, and the defendant, Bernard Tuchman, in person and by David Overmyer, his attorney, and in open court waive a jury in said cause, and agree that this cause be tried and determined upon the following agreed statement of facts, to wit:

"1. Said defendant was the proprietor of the place kept in the basement of the building No. 525, and situated on lot No. 169, Kansas avenue, in the city of Topeka, in said county and state, during the month of October, 1890.

"2. As such proprietor he sold intoxicating liquors in the original packages in which they were shipped to him as agent of the Anheuser-Busch Brewing Association, of St. Louis, Mo., a corporation, as charged in the first and second counts in the information filed herein.

"3. Said defendant sold said original packages as charged in the first and second counts of this information as the agent of said non-resident importer of the same, and in no other way, and said non-resident importer was at all times the owner of the intoxicating liquors kept in said place, and so as aforesaid sold, until they were sold as alleged herein by this defendant, as agent, and said liquors were sold in the original packages in which the same were imported into the state, and not otherwise.

"4. Neither the defendant nor his principal held a druggist's or other permit to sell intoxicating liquors from the probate judge of Shawnee county, and was not engaged in the drug business; but said defendant had paid his government license tax to the United States."

This agreed statement of facts was read to the court by the county attorney, who then moved that the court find the de-

---

Decision by the Court.

---

fendant guilty thereon, as charged in the first and second counts in the information; and then the appellant moved the court to require the county attorney to elect upon what sales of liquor he will ask a conviction upon the first and second counts of the information. This motion was overruled by the court, and the defendant saved proper exceptions. But if this ruling of the court is an error, it is one that occurred at the trial, and the trial court must be asked to review it on the motion for a new trial. Turning to the motion for a new trial, as contained in this record, we find that the only two causes assigned in the motion are, that the findings of the court are not sustained by sufficient evidence and are contrary to the evidence, and that the findings of the court are contrary to law. This being the condition of the record, we are not authorized to pass upon the question so ably discussed, because it is familiar law that such questions must be raised by a motion for a new trial.

It follows that we must recommend that the judgment of conviction be affirmed.

By the Court: It is so ordered.

All the Justices concurring.

*Per Curiam:* The case of THE STATE OF KANSAS V. CARL JOCKHECK is similar in all respects to the case of *The State v. Tuchman*, just decided, every question raised and discussed in the one being involved in the other. In fact, it is agreed in the briefs and on the argument that the decision in one is to stand for both.

For the reasons given in the *Tuchman* case, the judgment of conviction in this case will be affirmed.

*In the matter of the Petition of JAMES M. NICKELL for a Writ of Habeas Corpus.*

47	734
47	738
47	734
54	5

1. **CONTEMPT OF COURT—Procedure—Privilege of Accused.** Where proceedings for contempt of court are instituted against a party, whereby he is charged with inducing witnesses to absent themselves from court and otherwise avoid the process of the court, it is error for the state to place the accused upon the witness stand to prove the contempt charged. The offense being made a crime by statute, the accused cannot be compelled to give evidence which might criminate himself.
2. **CASE, Followed.** The rule to show cause why a party should not be punished for a constructive contempt of court should be based upon a verified complaint or information. (*The State v. Henthorn*, 46 Kas. 618, followed.)

*Original Proceeding in Habeas Corpus.*

THE material facts are stated in the opinion herein, filed February 6, 1892.

*C. W. Fairchild*, and *S. S. Ashbaugh*, for petitioner.

Opinion by GREEN, C.: The petitioner, James M. Nickell, alleges that he is illegally restrained of his liberty by the sheriff of Kingman county, because he refused to answer certain questions propounded to him against his will and over his objections, in a certain case pending in the district court of Kingman county, wherein the state was plaintiff and he was defendant, on the 28th day of December, 1891. The material facts are, that on the 26th day of December, 1891, there was pending in the district court of Kingman county a criminal action against the petitioner for selling liquor. The district judge issued an order which recited that there was reasonable ground for believing that the petitioner had, by bribery, menace, false pretensions, coaxing, threatening, and offering to pay for time lost, etc., induced and compelled and caused certain witnesses to absent themselves from court, and disobey a subpoena issued in the case of *The State v. James M.*

---

Opinion of the Court.

---

Nickell, who was charged with selling liquors; and being of the opinion that the conduct of the petitioner in inducing, compelling and causing witnesses to absent themselves from court was calculated to embarrass and obstruct the administration of justice, and was a contempt of court, ordered the petitioner to answer the charge and show cause why he should not be punished for contempt of court. On the 28th of December, 1891, the petitioner asked for a reasonable time in which to plead to the complaint, which request was overruled. He then objected to being tried under the complaint, and asked to be tried under the statutes, by information, and also asked for a jury. This request was refused by the court. The petitioner, over his objection, was then sworn as a witness, and placed upon the stand to testify on behalf of the state. He refused to answer the questions submitted to him by the state. The court then ordered him committed to the jail of Kingman county until he should answer such questions as had been propounded to him by the state. On the same day that the petitioner was committed, he made application to the probate judge of Kingman county for a writ of *habeas corpus*, which was granted, and a hearing was fixed for the 6th day of January, 1892, and the petitioner was ordered to give a bond for his appearance, which was furnished and approved. On the 29th day of December the district court ordered a warrant to issue for the arrest of the petitioner, under which he was taken and imprisoned in the county jail. This warrant was issued for the same cause for which the petitioner was originally committed. The petitioner then made application to this court for a writ of *habeas corpus*, which was granted on the 30th day of December, 1891.

The petitioner claims the right to be discharged and released from the order of commitment and warrant of the district court, on the ground that he was charged with a statutory crime; that § 155 of the crimes-and-punishments act makes it a misdemeanor for any person, by bribery, menace, or other means, to induce any witness to absent himself, or avoid a subpoena, or withhold his evidence, or deter any witness from appearing in

---

*In re Nickell, Petitioner.*

---

and giving evidence in any civil or criminal case; that he was compelled to go upon the witness stand for the purpose of giving evidence against himself; and, had he answered the questions propounded to him, such answers might have had a tendency to criminate him. The protection given by the constitution of the United States to all persons charged with crime is in the following language: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself." The right given under our own constitution reads, "No person shall be a witness against himself, or be twice put in jeopardy for the same offense." It is not only a constitutional right, but it is one of the fundamental principles of the common law, embodied in a maxim, that no man can be compelled to criminate himself. This right has become so much a part of government, in the administration of justice, that it has become as trite as it is true. The sole question for our determination is, whether the well-settled principle is applicable to the case before us. The petitioner is charged with a contempt of court; but the offense with which he is charged is not only a contempt of court but a statutory crime. Could the state, under such circumstances, compel the petitioner to go upon the witness stand and give evidence? This question must be resolved in favor of the petitioner. The supreme court of the United States, in the case of *Counselman v. Hitchcock*, United States marshal for the northern district of Illinois, recently decided and not yet officially reported, has held that, under the fifth amendment to the constitution of the United States, persons have the right to refuse to answer questions which might be used against them in criminal cases; and that this right must be construed in its broadest sense. The court in its opinion, rendered by Mr. Justice Blatchford, says in substance:

"That it does not find it necessary to consider any other point than that raised under the constitution as to the privileges of witnesses. It is urged, says the court, that a witness is not entitled to plead the privilege of silence except in a

---

Opinion of the Court.

---

criminal case against himself, but such is not the language of the constitution. Its provision is that no person shall be compelled in any criminal case to be a witness against himself. This provision must have a broad construction in favor of the right which it was intended to secure. The matter under investigation by the grand jury was a criminal matter, and the reason given by Counselman for his refusal was, his answer might tend to criminate him. His apprehension was that the answers might show that he had committed a crime against the interstate commerce act, for which he might be prosecuted. His answers, therefore, would be testimony against himself, and he would not be compelled to give them in a criminal case. It is impossible that the meaning of the constitutional provision could only be that a person should not be compelled to be a witness in a criminal prosecution against himself. The object was to insure that a person should not be compelled, when acting as a witness in an investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard."

The case of the petitioner is stronger than the Counselman case. Here the petitioner is charged with a crime, and the state was seeking to condemn and convict him out of his own mouth. Besides, the language of our constitution, if anything, is stronger than the fifth amendment to the constitution of the United States. Both by the letter and spirit of § 10 of the bill of rights, no person shall be a witness against himself. It does not even limit the right to criminal cases. We think the case of the petitioner comes clearly within the rule and right given by the fifth amendment to the constitution of the United States and the recent decision of the supreme court referred to, as well as § 10 of the bill of rights of our own constitution.

Another fatal objection which might be urged against the proceedings is, that the alleged contempt was not charged to have been committed in the presence of the court, and there was no written complaint properly verified, containing a statement of the facts constituting the offense, filed with the court. This has been held to be necessary in all cases of constructive

---

*In re McKenna, Petitioner.*

---

contempt. (See *The State v. Henthorn*, 46 Kas. 613, and *The State v. Vincent*, 46 id. 618.) There was a paper signed by the judge called a complaint, but it was in fact an order for the petitioner to show cause why he should not be punished for contempt, and it was not verified. If it be true, as counsel for the state has intimated—and there seems to be some ground for the charge—that there has been a disposition to obstruct the administration of justice and disregard the court's processes to secure the attendance of witnesses in the original case of which the present proceeding is an outgrowth, the prosecuting officer should see to it that the parties, whoever they may be, should be dealt with, and that condign punishment be administered to all persons who may be guilty of so grave an offense as interfering with the orders and processes of the court, or obstructing the administration of justice through the courts of the land. The remedy is plain and simple. Where parties have committed a crime of the nature charged in this case, the court can direct the county attorney to proceed against the parties as charged, or the county attorney can, upon his motion, proceed against them; and if the offense is as grave as claimed here, it is his duty to do so.

It is recommended that the petitioner be discharged.

By the Court: It is so ordered.

All the Justices concurring.

*Per Curiam:* The same questions are presented in *IN RE EDWARD MCKENNA* as in the petition of James M. Nickell for a writ of *habeas corpus*, just decided, and the petitioner is discharged, upon the authority of that case.

## THE CITY OF TOPEKA V. CHARLES HEITMAN.

1. **DISORDERLY CONDUCT**—*Complaint.* A complaint charging that H., on the 6th day of July, 1889, at the city of Topeka, county of Shawnee and state of Kansas, unlawfully and willfully disturbed the peace and quiet of the city of Topeka, by the use of loud, profane and indecent language, states an offense under §22 of ordinance 861 of said city.
2. **FINDING**—*Evidence.* The evidence examined, and held sufficient to support a finding by the jury that the peace of the city was disturbed by the defendant as alleged.
3. **INSTRUCTIONS**—*Exception, General and Indefinite.* The exception to the last instruction given by the court to the jury is too general and indefinite to save any objection to the instruction, except the usual one that it does not correctly state the law of the case. It is not sufficiently specific and certain to save the question whether or not the giving of the instruction after the jury had partially considered the case is error.

*Appeal from Shawnee District Court.*

PROSECUTION by the *City of Topeka* against *Heitman* for disturbing the peace. From a judgment of conviction, at the September term, 1889, the defendant appeals.

*H. C. Root*, for appellant.

*S. B. Isenhardt*, city attorney, for appellee.

Opinion by STRANG, C.: July 8, 1889, a complaint was made to the police court of the city of Topeka, charging that, on the 6th of the same month, the defendant, Charles Heitman, disturbed the peace and quiet of the city of Topeka by the use of loud, profane and indecent language. July 12, the defendant was tried in said police court and convicted, from which conviction he appealed to the district court of Shawnee county, where, on October 11, 1889, he was tried, and again convicted, and fined \$30 and costs. From this last conviction and judgment he appeals to this court, and alleges that the complaint and warrant upon which he was arrested do not charge an offense. Upon this question counsel for defendant



says, that the prosecution was brought under §21 of the city ordinance, and then proceeds to argue that the complaint fails to state a cause of action. The greater part of the defendant's brief is occupied by the argument that the complaint does not state a cause of action under said §21. But the city claims that the prosecution is under §22 of the city ordinance, and the record shows that the case was tried in the court below upon the theory that the prosecution was had under §22. The court in its charge to the jury says the complaint is under §22 of ordinance 861, and then quotes the operative words of the section. The case having been tried by the court below under §22 of the ordinance, we must treat the prosecution as having been brought under that section. That part of §22 of ordinance 861, as quoted by the trial court in its charge, reads as follows: "If any person shall disturb the quiet of the city, he shall be punished by a fine of not less than \$3, nor more than \$100." We think the complaint charges an offense under §22. It charges a disturbance of the peace by the use of loud, profane and indecent language. The peace may have been disturbed by loud talk alone. But we also think to call a man "a damn fool and a bastard," is the use of indecent language, and the peace of the city may have been disturbed by the use of such language. The jury found the peace of the city was disturbed by the defendant.

The defendant alleges that the court erred in calling the jury back into the court-room and giving them additional instructions. The city contends that the court did not thereby commit error; and also, that if it did, the defendant did not except to the time and manner of giving the instruction, but only to the law thereof, and has not therefore saved the question he now urges in the brief. We think the exception is too general to raise the question argued by the counsel making it. The language of the exception is as follows: "To the giving of the above and foregoing instruction, and to all the instructions, the defendant at the time duly excepted and excepts." There seems to be no distinction between the character of the exception to the last instruction and that which

relates to the other instructions. There is nothing in the language of the exception to the last instruction different from that in the exception relating to the other instructions, and nothing in the language of the exception that indicates any objection to the time or circumstances under which it was given. We do not think the attention of the court was called to the fact that the objection was to the time of giving the instruction and the circumstances under which it was given. There is nothing in the record showing that counsel for defendant desired to reargue the case to the jury after the last instruction was given. If he had asked such privilege and it had been accorded him, no error could have been assigned on account of such instruction. Inasmuch as the counsel was present when the last instruction was given, and did not indicate to the court after it was given his desire to reargue the case, so far as affected by said instruction, it is a serious question whether he did not by his silence waive his right. But we think no proper exception was saved as to the time of giving the objectionable instruction, and therefore the alleged error in connection therewith is not available.

It is recommended that the judgment of the district court be affirmed.

By the Court: It is so ordered.

All the Justices concurring.

### JAMES WHITE V. B. GEMENY.

1. **REPLEVIN**—*Pleading*—*General Denial*. In an action of replevin, any defense to the action may be proved under an answer containing a general denial only; and the plaintiff may, without a reply, rebut any defense proved thereunder.
2. **HOTEL-KEEPER**—*Omnibus, Exempt*. The 'bus of a hotel-keeper, a resident of Kansas, used in connection with his business in Kansas, and necessary to the successful prosecution of such business, is exempt under subdivision 3 of § 4 of the act relating to exemptions.

47	741
64	86

47	741
70	599

47	741
79	506

47	741
82	659

*Error from Geary District Court.*

THE opinion states the facts.

*Thomas Dever*, for plaintiff in error.

*James V. Humphrey*, for defendant in error.

Opinion by STRANG, C.: Action of replevin to recover the possession of a hotel 'bus. The plaintiff filed the usual petition in replevin, to which the defendant answered by a general denial; and also answered that the 'bus was taken by the defendant, a constable, on an execution issued on a judgment against the defendant. No reply was filed to the answer. The defendant moved for a judgment on the pleadings, which motion was overruled. The cause was then tried by the court without a jury, upon an agreement that if the court found the 'bus was exempt, the judgment should be for the plaintiff; otherwise it should be for the defendant. The court found for the plaintiff. The defendant filed a motion for new trial, which was overruled.

The plaintiff in error contends that he was entitled to judgment on the pleadings. We think not. This was an action of replevin, and the only pleadings necessary were the petition of the plaintiff and an answer containing simply a general denial. Any defense the defendant may have had could have been given in evidence under the general denial. (*Bailey v. Bayne*, 20 Kas. 657; *Yandle v. Crane*, 13 id. 344; *Kennett v. Fickel*, 41 id. 211.) All of his answer, therefore, except his general denial, was wholly unnecessary, and being unnecessary required no reply. If the defendant under the general denial could have shown that he took the property as an officer under legal process, the plaintiff could, without a reply, rebut the effect of such proof by showing that the property taken was exempt. We have noticed the cases cited by the plaintiff in error, *Babcock v. Farmers' Bank*, 46 Kas. 548, and *Scott v. Morning*, 18 id. 459, and others. None of these cases were replevin cases, and as the same rule does not prevail in

---

Opinion of the Court.

---

the class of cases cited as in replevin cases, they are not in point.

The plaintiff in error also contends that the court erred in its finding that the property was exempt, and in rendering judgment thereon for the plaintiff below. We see no reason why the business of hotel keeping is not within the third subdivision of § 4 of the exemption statute, and the trial court having found, under the evidence relating thereto, that the 'bus was a necessary adjunct to the hotel business of the plaintiff below, we think it must be held to be within the description in said statute of tools and implements used and kept by the debtor for the purpose of carrying on his business. (*Wilhite v. Williams*, 41 Kas. 288; and *Davidson v. Sechrist*, 28 id. 324.) In *Richards v. Hubbard*, 59 N. H. 158, it is held "that a physician's wagon and harness, used by him in riding to visit his patients, and reasonably necessary for his practice of his profession, are 'tools of his occupation,' within the meaning of General Laws, chapter 224, section 2, exempting property from attachment."

It is said that it does not appear that the plaintiff below was a resident of the state of Kansas when this suit was begun. On page 10 of the record he testified, "I reside at Junction City, Davis [Geary] county, Kansas," and we think the remainder of the evidence shows him residing there at the commencement of the suit. It is recommended that the judgment of the district court be affirmed.

By the Court: It is so ordered.

All the Justices concurring.

THE WINFIELD BANK V. J. B. NIPP, *as Treasurer of  
Cowley County, et al.*

**TAXATION OF BANKS—*Injunction.*** Where a bank, organized and existing under the laws of the state, having a capital stock of \$50,000, divided into 500 shares of \$100 each, which are held by various individual stockholders, makes a return to the proper assessor, verified by the oath of its president, showing that the bank is the owner of stock in a company or corporation of the actual value of \$22,000, and thereafter such return is properly filed in the office of the county clerk, and upon such return taxes are assessed and levied against the bank, *held*, that the bank cannot perpetually enjoin the collection of such taxes so levied upon the stock returned by it, upon the ground that the capital stock of the bank is held by individual stockholders. In such a case, no showing for equitable relief on the part of the bank is presented, as the assessment and levy of the taxes complained of were induced solely by the action of the bank.

*Error from Cowley District Court.*

ACTION by the *Winfield Bank* against *Nipp*, as treasurer, and *McIntire*, as sheriff of Cowley county, to enjoin the collection of certain taxes. Judgment for defendants, July 8, 1889. The plaintiff *Bank* brings error. The opinion states the facts.

*Peckham & Peckham*, for plaintiff in error.

*C. T. Atkinson* county attorney, for defendants in error.

The opinion of the court was delivered by

HORTON, C. J.: The facts in the case are as follows: On the 1st day of March, 1884, and for a long time thereafter, the Winfield Bank was a corporation duly organized and existing under the laws of this state, having a capital stock of \$50,000, divided into 500 shares of \$100 each, which shares were issued and in the hands of various individual stockholders. On the 23d day of April, 1884, J. C. McMullen, who was then the president of the bank, furnished to the proper assessor of the city of Winfield a statement, verified by his oath, showing that the bank was the owner of stock in a com-

---

Opinion of the Court.

---

pany or corporation of the assessable value of \$22,000. This statement was filed in the office of the county clerk by the assessor, and upon an equalization of the assessment, the value of stock was increased to \$24,420. Upon this statement, taxes were levied in the sum of \$1,030.47, and extended against the bank upon the personal property tax-rolls of the county for 1884. The taxes not being paid within the time prescribed by the statute, a warrant for their collection, with penalties and costs, was issued and placed in the hands of the sheriff. The sheriff was about to proceed to collect the same when restrained by a temporary injunction, granted at the instance of the Winfield Bank, which had commenced an action to perpetually enjoin the collection of the same.

On the 1st day of August, 1884, H. B. Schuler became the owner by purchase from J. C. McMullen and others of about four-fifths of the capital stock of the bank, and on the last-named day McMullen resigned his office as president of the bank and was succeeded in office by Schuler, who thereafter was the managing officer of the bank, at whose instance this action was brought. Upon the trial, the court below found in favor of the defendants, and rendered judgment for costs against the bank. Complaint is made of this ruling, and it is contended that the case of *Bank of Leoti v. Fisher*, 45 Kas. 726, is conclusive in favor of the plaintiff. In that case, no question of estoppel was presented, argued, or decided. Further, in that case, it appeared that before the assessment was finally completed the board of county commissioners received from the president of the Bank of Leoti a list of stockholders, with the amount of stock held by each on March 1, 1889. This action is not prosecuted by the stockholders of the Winfield Bank, and it is not alleged or shown that the stockholders have ever asked that their individual stock might be assessed for 1884. It does not appear that the stock held by the several stockholders was assessed for 1884. H. B. Schuler succeeded J. C. McMullen as president, but the action is not brought in his name, but in the name of the bank itself. The facts presented upon the trial disclose that all of the action

Culp v. Steere.

taken by the defendants in the assessment of the stock and in the levying of the taxes thereon was the result of the return of the Winfield Bank, duly verified by the oath of its president. The bank represented, through its managing officer, that on the 1st day of March, 1884, it had stocks in a company or corporation of the actual value of \$22,000. This statement was verified by the oath of the president, its managing officer; therefore we do not think there are any equities existing in favor of the plaintiff. The plaintiff asks in this case equitable relief. It does not make a case showing that it is entitled to the relief demanded. The mode of assessing stock in a state bank is prescribed by § 6868, Gen. Stat. of 1889, but, under the statute, the bank may pay the taxes assessed upon the individual stock of its stockholders and have a lien thereon. If the Winfield Bank had made a proper return under the oath of its president or managing officer to the assessor, then, of course, the statute would have to be complied with literally. (*Bank of Leoti v. Fisher*, supra.) But the action of the bank and its president have caused all the trouble complained of.

The judgment of the district court will be affirmed.

All the Justices concurring.

### C. W. CULP V. SOLON STEERE *et al.*

1. **WARRANTY**—*Action for Breach—Amendment of Petition.* The plaintiffs commenced an action against the defendant for damages resulting from the purchase and sale of a horse which was purchased by the plaintiff and sold by the defendant for a particular purpose, but was worthless for that purpose; and this transaction was brought about by the wrongful statements of the defendant. Afterward the court permitted the plaintiffs to so amend their petition as to show that these wrongful statements included an express warranty that the horse was fit for the purpose for which he was bought and sold, but at the same time imposed upon the plaintiffs substantially all the

47	746
62	861
47	746
63	20
47	746
65	624
47	746
e77	71
47	746
e78	246
79	351
47	746
81	235

---

Opinion of the Court.

---

costs made in the case up to the time of making the amendment. *Held*, That the court did not err in permitting the amendment.

2. *ACTION, Not Barred.* The action was brought within proper time so as not to be barred by any statute of limitations, but the amendment was not made until more than three years had elapsed after the purchase and sale of the horse, and the plaintiffs recovered in the action. *Held*, That the cause of action upon which the plaintiff recovered was not barred by any statute of limitations.

3. *NEW TRIAL—Amendment of Motion.* The defendant filed his motion for a new trial within proper time; but more than three days thereafter, and indeed nearly two months thereafter, he asked leave of the court to amend his motion for a new trial by adding thereto the following, to wit: "Errors of law occurring at the trial and excepted to by the defendant," which leave was refused by the court. *Held*, Not error.

*Error from Mitchell District Court.*

THE opinion states the case.

*W. D. Webb*, and *Grant W. Harrington*, for plaintiff in error.

*A. H. Ellis*, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought in the district court of Mitchell county on March 16, 1886, by Solon Steere, and a large number of other plaintiffs, as copartners under the name and style of "The Asherville Breeders' Association," against C. W. Culp, to recover damages resulting from the purchase and sale of an alleged worthless horse. The material portion of the petition, so far as any question is raised upon it, reads as follows:

"That in the month of March, 1884, said plaintiffs bought of said defendant one dark chestnut stallion, known as 'Jean Bart,' for the purpose of keeping and standing him as a stallion, of covering mares and getting colts; that it was well understood by said defendant that plaintiffs were purchasing said stallion for the purpose named above, and was sold by said defendant to said plaintiffs for the purpose of being used as a stallion; that at the time of said sale plaintiffs relied upon and traded with said defendant upon the assurance given by said defendant that said Jean Bart, the stallion aforesaid, was a



sure foal-getter, and was suited for and fitted for the purpose of begetting offspring, and that up to the time and at the time of said sale said plaintiffs did not know nor have any means of knowing that said stallion was impotent and barren. Plaintiffs say that at the time of said sale, and ever since, said stallion was utterly worthless for the purpose for which it was bought, being impotent and unable to beget any offspring."

On October 30, 1886, the plaintiffs amended their petition so as to correct some of the supposed defects therein. On November 20, 1886, the defendant answered thereto. On October 7, 1887, a trial was commenced before the court and a jury upon these pleadings. On October 11, 1887, after the parties had completed the introduction of their testimony, and before the argument of the case to the jury had been commenced, the plaintiffs asked leave of the court to again amend their petition, and the court granted such leave; but the defendant objected, and announced that he could not be ready for trial if the proposed amendments to the plaintiffs' petition were made, and thereupon the court discharged the jury and granted a continuance of the case until the next term of the court, and imposed all the costs in the case not otherwise adjudicated upon the plaintiffs. The court gave leave to the plaintiffs till November 15, 1887, within which to amend their petition, and gave leave to the defendant till December 15, 1887, within which to answer; and afterward, and on November 14, 1887, the plaintiffs amended their petition by filing a second amended petition, the material portion of which, so far as any question is raised thereon, reads as follows:

"That during the month of March, 1884, the said plaintiffs bought of the said defendant, for the price of \$2,500 then paid by the plaintiffs to the defendant, one certain dapple-gray stallion named 'Jean Bart,' that the said stallion was purchased for the express and only purpose of keeping and standing him as a stallion, covering mares and getting colts; that at the time of the said purchase the said defendant was informed and knew that the said plaintiffs were purchasing said stallion for the purpose above named, and the same was sold by the said defendant to these plaintiffs for the said purposes; that the said defendant at the time of the said sale, and as a

---

Opinion of the Court.

---

part of the terms and consideration of said contract of sale, then and there represented, promised and warranted to these plaintiffs that the said stallion was a sound, healthy horse, perfect in all his parts, and that he was a good breeder and a sure foal-getter; that at the time of the said sale the said plaintiffs, relying upon and confiding in the said representations, promise and warranty of the said defendant, purchased the said stallion, and paid therefor the sum of \$2,500 to the said defendant; that at the time of the said sale, representations, promise, and warranty, the said stallion was utterly worthless, and unfit for the purposes for which he was purchased as aforesaid, and that he then was barren and impotent, useless and valueless as a breeder and foal-getter; that by reason of the premises, the plaintiffs were misled and injured, and have sustained damages to the amount of \$2,500."

On December 14, 1887, the defendant moved to strike the amended petition from the files, for the reason that the cause of action set forth in the original petition was one of tort, founded upon deceit and false representations, while the cause of action set forth in the last amended petition is one on contract, and founded upon an alleged breach of warranty, which motion was by the court overruled, and on March 9, 1888, the defendant answered, and on March 15, 1888, he amended his answer. On March 30, 1888, the plaintiffs replied. Afterward, and from May 7 to 11, 1888, a trial was had before the court and a jury upon the last-mentioned petition, answer, and reply, which trial resulted in a general verdict in favor of the plaintiffs and against the defendant for the sum of \$2,300; and the jury also, in response to special interrogatories presented to them, made special findings of fact. On May 14, 1888, the defendant filed a motion for a new trial, which reads as follows;

"Now comes the defendant, C. W. Culp, by his attorneys, and moves the court to vacate the verdict in said action, and grant the said defendant a new trial in the same, for the following reasons, to wit:

"1. The court erred in refusing the motion of the defendant, filed December 14, 1887, to strike from the files of said action the paper denominated an 'amended petition,' filed in said action November 14, 1887.

"2. In refusing to admit the evidence offered on the trial of the said action in support of the defense set up in the second subdivision of the defendant's answer, in which the defendant claims that the plaintiffs, under pretense of amendment, changed their cause of action from one founded on tort to one founded on a contract; said refusal to admit such evidence being duly excepted to on the trial.

"3. In permitting the plaintiffs to amend their amended petition after having fully tried the case, and when nothing remained to be done but to submit the issues to the jury; and in permitting the plaintiffs to take advantage of the privilege of amendment so obtained, by changing their cause of action from an action founded upon false representations to an action founded upon an express contract and warranty."

On July 7, 1888, the defendant asked leave of the court to amend his motion for a new trial by adding thereto the following, to wit:

"4. Errors of law occurring at the trial and excepted to by the defendant."

Which leave was refused by the court; and on the same day the motion for the new trial was overruled by the court, and the court then rendered judgment in favor of the plaintiffs and against the defendant in accordance with the general verdict and special findings of the jury; and on July 5, 1889, the defendant, as plaintiff in error, brought the case to this court for review, making the plaintiffs below defendants in error.

The principal alleged error is the permission given by the court below to the plaintiffs below, defendants in error, to amend their petition as it was amended on November 14, 1887. It is claimed that by this amendment the plaintiffs wholly changed their cause of action from one of tort, founded upon fraud and deceit, to one on contract, founded upon an alleged breach of warranty. The provisions of our statute authorizing amendments are very broad, liberal, and comprehensive. (Civil Code, § 139.) About the only limitations upon making amendments are, that they shall be made only "in furtherance of justice, and on such terms as may be

## Opinion of the Court.

proper;" and if of pleadings, that the amendments shall "not change substantially the claim or defense." The amendment in the present case cannot be said, by the defendant below, not to be in furtherance of justice and on proper terms, for the court below, as a condition to making the amendment, imposed upon the plaintiffs substantially all the costs made in the case up to the time of making the amendment; and we do not think that the amendment changed substantially the plaintiffs' claim. The statute does not provide that the amendment shall not change the form of the action or cause of action, but it simply provides that the amendment shall not "change substantially the claim or defense." Now we do not think that the claim of the plaintiffs in the present case was changed substantially by the amendment. The original petition attempted to set forth a cause of action for the recovery of damages resulting from the purchase and sale of a worthless horse, such purchase and sale being brought about by the wrongful statements of the defendant, and the amended petition set forth a cause of action for substantially the same thing. The principal wrongs alleged in the amended petition were the wrongful statements made by the defendant, including a warranty that the horse was sound and good for the purposes for which he was bought and sold, when in fact he was not such a horse as he was warranted to be, and therefore that there was a breach of the warranty at the very time of the purchase and sale, for which breach the defendant was and is liable. In Ohio it has been held that the restriction upon amendments contained in their code, that the proposed amendment "must not change substantially the claim or defense," does not refer to the form of the remedy but to the general identity of the transaction forming the cause of the complaint. (*Spice v. Steinruck*, 14 Ohio St. 213.) Also, as the amendment was permissible and was in fact made, and as the plaintiffs' action was commenced within much less than three years and perhaps less than two

1. Warranty—action for breach—amendment of petition.

## Culp v. Steere.

2. Action, not  
barred.

years after the original cause of action accrued, there is no room for claiming that the cause of action upon which the plaintiffs recovered was barred at the time by the operation of any statute of limitations.

It seems to be further claimed that the court below erred in refusing to permit the defendant below, plaintiff in error, to amend his motion for a new trial by alleging 'errors of law occurring at the trial and excepted to by the defendant.' No

3. New trial—  
amendment  
of motion.

such error was committed. A motion for a new trial including such a ground must be filed within three days after the verdict is rendered, unless the party desiring to file the same is unavoidably prevented from filing it within that time. (Civil Code, § 308.) And there is no pretense that the defendant below in this case was unavoidably prevented from filing his motion for a new trial including this ground within less than three days. The defendant waited almost two months before he attempted to interpose any such ground for a new trial, and he was too late. The decision of this question also disposes of the claims of error attempted to be presented in this court by the defendant below, plaintiff in error, with respect to the rulings of the court below occurring at the trial, in other particulars than those mentioned in subdivision 2 of the defendant's motion for a new trial. The first-mentioned rulings we cannot consider.

The judgment of the court below will be affirmed.

All the Justices concurring.

THE WICHITA & WESTERN RAILWAY COMPANY V.  
GUSTAVE KOCH.

47	753
48	212
47	753
69	174
47	753
73	408
74	604

1. **CARRIERS—Live-Stock Shipments—Connecting Lines.** Where a railroad company contracts to carry stock beyond its own terminus, and there is a stipulation in the contract, which is a condition precedent to a right to recover for loss or injury, that the shipper must give written notice of his claim to an officer of the company, or its nearest station agent, before the stock is removed from the place of destination or delivery or is mingled with other stock, the officers and agents of the connecting company used and adopted by the contracting company should, for the purposes of the contract, be treated as the officers and agents of the latter company, and notice given to the agent of the connecting company at the place of destination will be sufficient.
2. **NOTICE, Not Given as Contract Required.** In the present case notice was not given to the carrier until 12 days after the delivery and removal of the stock; and under the evidence it is *held*, that notice was not given as the contract required, or within reasonable time.

*Error from Sedgwick District Court.*

ACTION by *Koch* against the *Railway Company*, to recover for the injury to and loss of certain hogs. Judgment for plaintiff, June 8, 1889. The defendant brings error. The opinion states the facts.

*Geo. R. Peck, A. A. Hurd, and Robert Dunlap*, for plaintiff in error.

*Sankey & Campbell*, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, J.: This action was brought by Gustave Koch against the Wichita & Western Railway Company to recover damages for the injury and loss of certain hogs, which the railway company undertook to carry from Cheney to Kansas City. It was alleged that a car-load of hogs was shipped on January 7, 1886, and that through the negligence of the company 18 of the hogs died, two of which were left at Wichita, and were a total loss, and that 16 of the dead hogs were de-

livered in Kansas City, but were of but little value; and that by reason of the death of the hogs Koch was damaged in the sum of \$125. It was further alleged, that through the negligence of the company the hogs were greatly delayed in transportation, and were negligently handled, so that many of them were so frozen and injured as to depreciate them in value, in consequence of which there was a loss of \$100. It was further alleged, that by the delay of the company in transporting the hogs there was a decline in the market price of the same, to the damage of the shipper of \$25. A further claim of damages was made upon a shipment of stock in 1887; but there was no competent testimony given upon this claim, neither was there any allowance made by the jury for the same in their verdict, and it may be laid out of consideration. The jury returned a verdict in favor of Koch for \$201.65, and the special questions submitted and answered show that \$175.15 of that sum was allowed for the hogs frozen to death, and \$26.50 of it for the shrinkage of the remainder from cold and suffering on the route. The testimony tended to show that the hogs were loaded and started to Kansas City on January 6, and that soon afterward it became very cold and began to snow, so as to blockade the railroad and delay the train on which the hogs were being carried. The storm and cold increased in severity, and continued for several days. After considerable effort the hogs were delivered to the agents of Koch at Kansas City on January 13. They were then in bad condition; 16 of them were dead, two had been left on the way, and others were badly frozen and injured. They were sold and delivered to the packers in Kansas City on the day of their arrival. The shipping contract made between Koch and the railway company provided, among other things—

“That, as a condition precedent to his right to recover any damages for loss or injury to said hogs, he will give notice in writing of his claim therefor to some officer of said party of the first part, or its nearest station agent, before said stock is removed from the place of destination above mentioned, or from the place of delivery of the same to said party of the second part, and before such stock is mingled with other stock.”

---

Opinion of the Court.

---

Upon this stipulation the court instructed the jury as follows:

"Before you can find for the plaintiff, he must show by the greater weight of the evidence that the plaintiff notified the defendant in writing of the loss or injury to said stock before said stock was moved from the yards, or from the place of delivery, or before such stock was mingled with other stock."

No notice was given before the sale and delivery of the stock to the packers at Kansas City, nor was there any notice given until January 25, 12 days after the hogs had been disposed of. The instruction given by the court with reference to the giving of a notice must be taken as the law of the case. Not only that, but it has been held that such a stipulation or contract is reasonable, just, and valid. (*Goggin v. Railway Co.*, 12 Kas. 416; *Sprague v. Railway Co.*, 34 id. 347.) The record shows that the plaintiff below wholly failed to bring himself within the requirements of the instruction of the district court by showing a compliance with this provision. It is not contended that there was any unfairness, misrepresentation or fraud in the making of the contract, but it is contended that compliance with the same was unreasonable and impracticable.

The contract was made with the Wichita & Western Railway Company, the eastern terminus of whose line is at Wichita, and the stock was forwarded over the Atchison, Topeka & Santa Fé railroad from Wichita to Kansas City. They appear to be, or at least at that time were, separate corporations. It is urged that the giving of a notice to the agent of the Wichita & Western Railway Company at Wichita of loss and injury discovered at Kansas City would be wholly impracticable. It is said that, unless the stock which is shipped there for sale is speedily disposed of, great expense and loss must ensue, and that therefore to wait until a notice was given to the officers or agents of the Wichita & Western Railway Company is so unreasonable a provision as to defeat its validity. The agreement of the contracting company was to carry the stock, not to Wichita, but to Kansas City. According to the contract, it became the carrier for the whole dis-



tance; and, in effect, it adopted the line of the connecting company as its own, and to that extent it made the officers and agents of that company its own officers and agents. The station agent, therefore, of the Atchison, Topeka & Santa Fé Railroad Company at Kansas City must, for the purposes of this contract, be deemed the agent of the Wichita & Western Railway Company; and a service of a written notice upon that agent would have been a sufficient compliance with the stipulation in question. (*Railroad Co. v. Roach*, 35 Kas. 743; *Railroad Co. v. Fort*, 9 Am. & Eng. Rld. Cases, 392; *Lawson, Com. Car.*, § 235.) And so it is held that the connecting carriers are entitled to the exemptions and liabilities in the special contract made by the initial carrier for the whole distance. (*Kiff v. Railroad Co.*, 32 Kas. 263; *Railway Co. v. Harwell*, 45 Am. & Eng. Rld. Cases, 359; *Lawson, Com. Car.*, § 243.) The connecting company had an agent at the place of destination, upon whom written notice could have been served without difficulty or delay, and who could have inspected the dead hogs, as well as the injured, before they passed into the hands of the packers and beyond the possibility of examination. Such provisions are to receive a reasonable interpretation, and a substantial compliance with the contract on the part of the shipper is sufficient. (*A. T. & S. F. Rld. Co. v. Temple*, ante, p. 7; same case, 27 Pac. Rep. 98.) The circumstances of each case must determine how promptly notice must be given, and whether that which is given is reasonable, considering the purposes for which such contracts are made. The necessity for prompt notice was as great in this case as in the Goggin case, where it was said that "unless the notice was given immediately, it would be of no value to the defendant." Instead of giving notice before the removal of the hogs, as might reasonably have been done, the plaintiff postponed it until the 25th of January, nearly two weeks after the time when notice should have been given. In this respect, therefore, the testimony fails to meet the requirements of the instruction given by the court, and is insufficient to sustain the verdict and judgment.

Kimball v. Bell.

Some other objections are made, which it is not deemed necessary to notice.

The judgment of the district court will be reversed.

All the Justices concurring.

## ELBRIDGE G. KIMBALL V. JOHN L. BELL.

1. **SALE OF LAND—*Defective Title—Recovery by Vendee of Money Paid.*** Where K. sells to B. certain blocks of land, and gives B. a title bond, in which he agrees, upon payment of the purchase-money by B., to execute and deliver to B. a deed conveying an indefeasible estate in fee-simple, B. may refuse to accept a deed for said blocks of land upon the discovery of a cloud on the title in the form of an unsatisfied mortgage of record; and unless K., within a reasonable time after demand, pays such mortgage, or procures a release of the same, B. may bring suit to recover back the money paid on such contract.
2. ——— ***Evidence.*** In an action to recover the purchase-money, B. is not required to go behind the record and show that, in fact, the mortgage has not been paid. It is sufficient if he show the mortgage of record and unsatisfied.
3. ——— ***Demurrer to Evidence.*** Having made such showing, a demurrer to the evidence will not lie upon the ground that he failed to show the mortgage had not in fact been paid.
4. **PRACTICE—*Trial on Wrong Theory.*** Where an action to recover back the purchase-money has been erroneously tried by the court below upon the theory that time was of the essence of the contract, and that the vendee upon the payment of the last installment of the purchase-money might immediately demand a deed, and if not forthcoming at once, might commence his suit to recover back his purchase-money, yet if the record shows that at the time of the trial, more than three months after the final payment and demand for a deed, and after a lapse of a reasonable time after such payment and demand, the vendor was not in a position to perform the conditions of his bond, by giving an indefeasible estate in fee-simple, the fact that the case was tried upon a wrong theory does not constitute necessarily reversible error.

*Error from Ellsworth District Court.*

THE opinion states the facts.

47	757
49	174
47	757
53	573

47	757
74	751

*Garver & Bond, and Henry M. Burdett, for plaintiff in error.*

*Ira E. Lloyd, for defendant in error.*

Opinion by STRANG, C.: On the 16th of June, 1887, the plaintiff, Kimball, sold to the defendant, Bell, blocks 7 and 31 in Getty & Larkin's addition to the city of Ellsworth, and gave him a title bond therefor, in which he agreed to execute and deliver to Bell, upon the payment by him of the purchase-money therein named, a good and sufficient warranty deed, conveying an absolute and indefeasible estate in fee-simple to said blocks of land. Having made the last payment on said land, Bell demanded of Kimball a deed therefor on the 5th of January, 1889. On the 17th of the same month suit was begun by Bell to recover back the purchase-money, alleging that Kimball had failed to comply with the conditions of his bond by giving deeds. The case was tried April 22, 1889, by jury. A demurrer to the evidence was interposed by Kimball, but it was overruled. The jury found for the plaintiff below. Motion for a new trial was argued and overruled.

The first contention of the plaintiff is that the demurrer to the evidence should have been sustained. This contention is based upon the theory that the plaintiff having brought this suit to recover back the purchase-money, upon the alleged failure of the vendor to comply with the conditions of his bond in relation to the title, the plaintiff must show that the deed tendered by the vendor as a compliance with the conditions of his bond did not in fact convey a good and indefeasible title in fee-simple to the blocks sold, before he can recover; and that simply proving that an unsatisfied mortgage was on record against the blocks did not constitute such a showing, because a mortgage might be unsatisfied of record, and yet be fully paid; and because of this it was the duty of the plaintiff below to have shown that the mortgage had not in fact been paid, because if the mortgage had in fact been paid,

---

Opinion of the Court.

---

though not satisfied of record, the deed tendered would have conveyed such a title as the bond called for, and the plaintiff could not have recovered.

We agree with counsel for plaintiff in error that, to make a case, the plaintiff below must have shown that the deed tendered him before suit brought did not convey a good and indefeasible estate in fee-simple. But we think the plaintiff below did show that, at least *prima facie*, when he showed that there was of record an unsatisfied mortgage against these blocks. We think the law is well settled that the vendee is not required to accept a deed, though in form a warranty, stipulating that the land is free from all incumbrances, when there is a cloud upon the title in the shape of an unsatisfied mortgage of record. Though a deed in proper form has been tendered, the vendee seeking to recover back the price paid for land may justify his refusal of said deed by showing an unsatisfied mortgage of record against the land. In *Durham v. Hadley*, ante, pp. 81, 82, Chief Justice HORTON, speaking for the court, says:

"It is undoubtedly true that, where an incumbrance is discovered upon land, the vendor must discharge it before he or she can compel the payment of the purchase-money by the vendee at law or in equity. In this case, it is claimed that no incumbrance existed, because the mortgage had been paid; but the records in the office of the register of deeds show no release and no payment to any party having authority to release or accept payment. . . . Mrs. Bowen ought, before she made her contract, or offered her deed, or at least before this action was brought, to have had Charles H. Thompson release on the record the mortgage of \$834 and all interest, if it is paid, or she ought to have had the written assignment of the mortgage to Benj. F. Jewett recorded, if Jewett was ever the legal owner thereof. She did none of these things, and none of these things have yet been done. The title is clouded with an apparent incumbrance. . . . The facts are, that Durham could not and cannot obtain a good marketable title. He cannot be compelled to accept any other."

This the plaintiff below did in this case. He showed an unsatisfied mortgage against the land sold to him. He was not

required to go behind the record and show that the mortgage had not in fact been paid. Having shown a *prima facie* case, he might rest. If then the defendant could show that the mortgage had in fact been paid, though not satisfied of record, such showing would defeat the *prima facie* case of the plaintiff, and he could not recover. In this case the defendant made no showing, or offer to show, that the mortgage had in fact been paid. The unsigned memoranda, without date, on the margin of the mortgage introduced in evidence, are of no value, except, perhaps, as a mere pointer to call attention to the place where a release might be found. Of itself, it was no evidence of a release of the mortgage.

It was decided in *O'Neill v. Douthitt*, 40 Kas. 689, that "where an abstract of title shows that a mortgage on the land has been recorded, it is then necessary, in order that the abstract shall show a good and complete title, that it shall also show that the mortgage was not only released and discharged of record, but also that the person releasing or discharging the same had full and complete authority of record to do so." (See, also, *Durham v. Hadley*, ante, p. 73; same case, 27 Pac. Rep. 105.) If a release of the mortgage, so far as the southeast quarter of section 17 was concerned, was to be found in the book referred to in said memoranda on the margin of the mortgage, it could easily have been introduced in evidence by the defendant below. We do not think the record shows the defendant below was in a position, even at the time of the trial, to give a good and indefeasable title in fee-simple to the blocks of land described in his title bond. (*Durham v. Hadley*, supra.)

It is claimed by the plaintiff herein that the case was tried by the court below on a wrong theory; that the court tried the case all the way through upon the theory that time was of the essence of the contract, and that the vendee might demand a deed immediately upon the payment of the last installment of the purchase-money, and if the vendor failed to respond therewith at once the vendee was at liberty to immediately bring suit for the purchase-money. This may be true. There

---

Opinion of the Court.

---

are some things in the record indicating that it is. And if true, the court was certainly mistaken in its view of the rights of the parties in relation thereto, under the contract. There is nothing in the contract making time of the essence thereof. Under the contract, we think either party thereto was entitled to a reasonable time, after demand, in which to perform the conditions thereof. But if this was true, how is it material? If the defendant below was not in a position to make a good title at the time of the trial, which was more than three months after the last payment and demand for a deed, he was not in a position to perform the conditions of his bond within a reasonable time after the payment and demand. Three months was certainly a reasonable time, and as long as he could ask, in which to make a deed, upon the defendant's own theory of the law in the case. We think if the court tried the case upon the theory that the plaintiff in error claims it did, (and we are inclined to think it did,) it was an erroneous theory upon which to try it, but we do not see how the defendant was injured thereby. If the court had tried it upon the proper theory, the defendant was in no position to defend against the action, because he could not perform after a reasonable time had elapsed.

We think the case must be affirmed. It is therefore recommended that the judgment of the district court be affirmed.

By the Court: It is so ordered.

All the Justices concurring.

## THE MEYER BROS. DRUG COMPANY V. CHARLES A. MALM.

1. *ATTACHMENT—Dissolution—Affidavits as Evidence—Notice.* The defendant in an attachment action moved to dissolve the attachment because the grounds laid for the same were untrue, and at the same time made and filed an affidavit alleging that the grounds were untrue, but he did not state in his notice to plaintiff that affidavits would be used on the hearing of the motion. At the time set for the hearing plaintiff asked and obtained a continuance of the hearing to enable him to procure evidence to resist the motion and affidavit of defendant. At the final hearing the affidavit mentioned was admitted in evidence over the objection of plaintiff. *Held*, That the defendant's failure to state in his notice that affidavits would be used on the hearing did not render the reception of the affidavit prejudicial error.
2. ——— *Removal of Cause.* A plaintiff who institutes an action in the state court cannot remove the same to the United States circuit court on account of prejudice or local influence.

*Error from Harvey District Court.*

ACTION by the *Meyer Bros. Drug Company* against *Charles A. Malm* on promissory notes. Pending a motion by defendant to dissolve an attachment therein, plaintiff applied for a removal of the cause to the United States circuit court. Motion to dissolve the attachment sustained, and the application for removal denied. Plaintiff brings error.

*Brown & Kline*, for plaintiff in error.

*A. L. Greene*, for defendant in error. ,

The opinion of the court was delivered by

JOHNSTON, J.: This action was brought by Meyer Bros. Drug Company to recover from Charles A. Malm \$1,683.90 upon several promissory notes and an account, all of which were for goods sold by the plaintiff to the defendant. At the commencement of the action the plaintiff procured an attachment to issue, which was levied upon real estate and a stock of merchandise belonging to the defendant. The action was

---

Opinion of the Court.

---

begun and the attachment was issued and served on June 17, 1889. On June 22 of the same year, the defendant moved to discharge the attachment, for the reason that the grounds laid in the affidavit therefor were untrue, and at the same time filed an affidavit denying the grounds laid for the attachment, and stating that each and every allegation therein was untrue and false. On June 26, 1889, the cause came on to be heard upon the motion to dissolve the attachment, when both parties appeared by their attorneys; when the plaintiff asked for a continuance of the hearing in order to procure evidence to be used upon the hearing of the motion. The application was granted, and the cause continued until July 9, 1889. On June 27, 1889, the plaintiff filed a petition for the removal of the case to the United States circuit court, reciting that the amount in dispute, exclusive of costs, exceeded \$500, and that the plaintiff was a citizen of a state other than Kansas, and had reason to and did believe that from prejudice and local influence it was unable to obtain justice in the state court. A bond sufficient in form and amount was tendered, which was approved by the judge. On July 9, a hearing was had on the application for removal to the federal court, as well as the motion to discharge the attachment. The application for removal was denied, upon the ground that the case was not removable; and the motion to discharge the attachment was sustained.

Error is assigned on the reception by the court of the affidavit made by plaintiff denying the grounds laid for attachment, because the notice to dissolve failed to state that affidavits would be used upon the hearing. The plaintiff was entitled to notice that the affidavit was to be used when the motion was heard. (Civil Code, § 534.) It cannot be said, however, that the plaintiff was without notice. The affidavit was made and filed in the court four days before the time set for the first hearing, and 17 days prior to the final hearing of the same. At the first hearing plaintiff had evidently become aware of the filing of defendant's affidavit, and it asked a continuance in order to obtain evidence with which to resist defendant's affidavit and motion. When the hearing occurred,



---

Mastin v. Levagood.

---

no other proof was offered than the affidavit which has been referred to. Under these circumstances, the omission and failure of the defendant to specify in his notice that an affidavit would be used could not have prejudiced the plaintiff.

Complaint is also made of the ruling of the district court denying the application to remove the cause to the federal court. Although the plaintiff is a non-resident of the state, it chose its forum and must remain there. Only those who occupy the position of defendants can exercise the right of removal on account of local influence or prejudice, as the law now stands. The cause was not removable at the instance of the plaintiff on the ground stated, and if it had been the affidavit must have been held to be insufficient. (25 U. S. Stat. at Large, 435; *In re Penn. Co.*, 137 U. S. 457; *Walcott v. Watson*, 46 Fed. Rep. 529; *Foster's Fed. Pr.*, § 383.)

The judgment of the district court will be affirmed.

All the Justices concurring.

---

E. E. MASTIN *et al.* v. I. H. LEVAGOOD.**MASTER AND SERVANT—*Dangerous Machinery—Liability for Damages.***

When the owners of a horse-power threshing machine are guilty of gross negligence by leaving the bevel wheel and cogs uncovered knowing them to be imminently dangerous to human life and limb in this uncovered condition, and a workman engaged in threshing with the machine in this condition attempts to oil the cylinder without the knowledge of the uncovered condition of the bevel wheel and cogs, and in this attempt loses his hand, the owners of the machine are liable for damages occasioned by such injury.

*Motion for Rehearing.*

THE facts appear in *Mastin v. Levagood*, ante, pp. 36 *et seq.*, and in the opinion herein, filed February 6, 1892.

*Keller & Dean*, for the motion.

*Grattan & Grattan*, contra.

*Per Curiam*: We have been asked to reëxamine the grounds of the opinion handed down by the commission. We have done so with great care, but the result has not changed our former conviction. The authorities cited by the counsel for plaintiff in error concerning intermeddlers and volunteers do not, we think, apply in this case. At the time that Levagood was injured he was not a mere intermeddler or volunteer. There is some evidence to show that his duties did not require him to confine himself to pitching grain only. On the day of the injury, E. E. Mastin, one of the owners of the threshing machine, was driving the horse-power. Jack Mastin and Wm. Rankin were feeders, but Jack Mastin, whose father owned one-third of the machine, seemed to act as the boss of the work. When the machine was set up and ready to work, the horse-power got out of fix, and both the Mastins asked Levagood to help fix the machine, and with a wrench he took some caps off the bolts of the machine. Rankin, who is experienced in the running of threshing machines, testified, among other things, "that he asked Jack Mastin to oil the cylinder, but as he was sick, and down on his knees and hands, gagging from dust, he then told Levagood to oil the cylinder." He was asked:

"Q. It wasn't the part of anybody's duty to do that except the hands or men running with the machine? A. Well, the threshing-machine hands, they generally do ask others when they are attending the separator, or sick or something that way, they ask some one that is close by; I have done that.

"Q. That isn't the rule, I believe. A. Yes, that has been with us.

"Q. You have run a machine? A. Yes, sir."

It also appears from the evidence that when the Mastins were operating the threshing machine a few days before the injury, at Mr. Thresher's, Mr. Applegood (not a regular feeder) was permitted to feed, and also to oil the cylinder after the

C. K. &amp; W. Rld. Co. v. Comm'rs of Anderson Co.

shield was off. Jack Mastin, the boss of the work, testified about the accident, among other things, as follows: "Well, I don't know much about it. I was sick, lying down. Levagood came and asked me for the oil can; I don't know what he was going to do with it. . . . I told Levagood I didn't know anything about where the oil can was."

"Q. Did you ask him what he wanted to do? A. No, sir.

"Q. You told him to hunt around? A. Yes, sir."

On account of the foregoing, and other evidence contained in the record, we cannot say that the instructions were erroneous, or the verdict unsupported.

The motion for a rehearing will be overruled.

47	766
51	489
52	728
52	749
47	766
59	108
59	663
47	766
61	212

### THE CHICAGO, KANSAS & WESTERN RAILROAD COMPANY V. THE BOARD OF COMMISSIONERS OF ANDERSON COUNTY *et al.*

47	766
65	347
65	348
47	766
69	575

**RES JUDICATA**—*Rule.* The rule of *res judicata* applies as well to facts settled and adjudicated as to causes of action.

### *Original Proceeding in Mandamus.*

THE opinion herein, filed February 6, 1892, contains a sufficient statement of the facts.

*Geo. R. Peck, A. A. Hurd, and Robert Dunlap, for plaintiff.*  
*James D. Snoddy, for defendants.*

*Per Curiam:* Motions have been filed upon the part of the plaintiff against the defendants to quash the return filed to the alternative writ, and also for a peremptory writ of *mandamus* to issue at once, notwithstanding the allegations contained in the return. The motions will not be sustained at this time; but, in view of the arguments before the court concerning the

47	766
70	944
47	766
82	45

## Decision by the Court.

allegations of the return for a peremptory writ, that there may be no attempt to relitigate or reargue questions which have already been settled and determined in the case of *C. K. & W. Rld. Co. v. Ozark Township*, 46 Kas. 415, decided at the January term of this court for 1891, which was subsequently entered under a mandate from this court by the district court of Anderson county, we deem it necessary to say something concerning the proceedings in the latter case. The parties in this action are virtually the same as in the action of the *C. K. & W. Rld. Co. v. Ozark Township*, supra, and the subject-matter between the parties is the same, excepting the recitation in the writ in this case of the tender of \$10,000 of the stock of the railroad company subsequent to the entry of the judgment against Ozark township by the district court of Anderson county. The rule of *res adjudicata* applies as well to facts settled and adjudicated as to causes of action. When a matter is once adjudicated, it is conclusively determined between the same parties and their privies as to all matters which were or might have been litigated; and this determination is binding, as an estoppel, in all other actions, whether commenced before or after the action in which the adjudication was made. (*Hentig v. Redden*, 46 Kas. 231; *Railroad Co. v. Comm'rs of Jefferson Co.*, 12 id. 127; *Whittaker v. Hawley*, 30 id. 327; *Hoisington v. Brakey*, 31 id. 560; *W. & W. Rly. Co. v. Beebe*, 39 id. 465; *Comm'rs of Marion Co. v. Welch*, 40 id. 767; *Shepard v. Stockham*, 45 id. 244; *Freeman*, Judgm., § 249; *Poorman v. Mitchell*, 48 Mo. 45; *Allis v. Davidson*, 23 Minn. 442; *Casebeer v. Mowry*, 55 Pa. St. 419; *Franklin Co. v. Savings Bank*, 12 U. S. 147.) We therefore are of the opinion that everything that was litigated in the action of *C. K. & W. Rld. Co. v. Ozark Township*, supra, or that might have been litigated therein, was determined in that case, and cannot be opened up again. Therefore, there can be no litigation in this action over the terms of the submission under which the railroad claims the right to have the bonds issued, or the subscription, or the construction of the road, or the initial points thereof. All of these matters were, or could have been, liti-

gated in the action determined; and therefore the judgment heretofore rendered by this court and the district court of Anderson county is a bar to any further controversy over these or any similar matters. All that is left for this court to determine concerns the tender of the stock of the railroad company, subsequent to the rendition of the judgment in the district court in Anderson county, in accordance with the mandate of this court.

It is probable that there was sufficient evidence introduced upon the hearing of this motion to authorize a judgment as prayed for to be entered for the plaintiff against the defendants, but in view of the return concerning the denial of any tender of stock, it would be irregular to hear and dispose of the case upon evidence before it has been assigned for hearing. Since the foregoing motions were filed, James Black, one of the county commissioners, and S. Durall, county clerk of Anderson county, have filed supplemental returns, showing that on the 7th of January, 1892, they ceased to be county officers. It is therefore ordered that their successors in office be substituted and made parties defendant in this action, and that the alternative writ be corrected accordingly, and notice thereof given to said successors in office. The case will be set down for hearing at the next sitting of this court, upon the only matter left in dispute, which concerns the alleged tender of stock referred to, and the clerk will notify the parties.

*In the matter of the Appeal of S. LOWE, Prosecuting Witness, from a Judgment against him for Costs.*

**COSTS IN CRIMINAL CASES—***Liability of Complaining Witness—Constitutional Law.* Section 326 of the criminal code, which provides that a prosecuting witness may be committed for his failure to pay costs when the jury find the defendant not guilty, and also find that the prosecution was instituted from malicious motives and without probable cause, is not unconstitutional. (*In re Ebenhack*, 17 Kas. 618, followed.)

*Motion for Rehearing.*

THE facts sufficiently appear in *In re Lowe*, 46 Kas. 255, *et seq.*, and in the opinion herein, filed February 6, 1892.

*J. V. Beekman*, and *M. B. Light*, for the motion.

*John N. Ives*, attorney general, and *L. C. Whitney*, county attorney, *contra*.

*Per Curiam:* The contention in this case is really over the constitutionality of the statute permitting a prosecuting witness to be committed for his failure to pay costs when the jury find the defendant not guilty, and also find that the prosecution was instituted from malicious motives and without probable cause. (Crim. Code, § 326.)

Section 275, chapter 31, Gen. Stat. of 1868, (§ 309 of the Crimes Act, ¶ 2449, Gen. Stat. of 1889,) is also referred to. An argument is presented against its constitutionality. But we need refer only to § 326 of the criminal code to dispose of the motion now pending. The constitutionality of this statute is upheld in *In re Ebenhack*, 17 Kas. 618, decided in 1877, about 15 years ago. Mr. Justice BREWER delivered the opinion, and, among other things, said:

“That the prosecuting witness by coming into court and filing his complaint submits himself to the jurisdiction of the justice, and at the same time that the question of the guilt of the person, by his affidavit charged with crime, is tried, his own conduct in the premises is inquired into. True, he is not

upon the record as a party plaintiff or defendant, but the prosecution is instituted at his instance, and he appears upon the record as the complaining party. Many civil proceedings were formerly in the name of the state upon the relation of some one. . . . It is true, also, that no formal accusation is presented against the complainant upon which he is tried and found guilty, and that the first written statement of his wrong is in the finding and order; but the same is equally true in many cases in commitments for contempt. There, often the first writing is the order of the court committing the offender for the contempt. The proceeding is summary, but it is clear that it is due process of law, and that the offender has had his day in court. Indeed, it may well be considered that he who maliciously, or without probable cause, invokes the process of a court to oppress and wrong an innocent party, by placing him under arrest and upon trial for violation of law, is guilty of a contempt of court."

The present case was decided at our January term for 1891, in obedience to the *Ebenhack* case. That decision has established for a long time a rule opposite to the decision referred to in *The State v. Ensign*, 11 Neb. 529. We cannot now depart from the *Ebenhack* case without overruling various subsequent decisions, and we are not willing to do so. If § 326 of the criminal code, as construed, works injustice in any case, the legislature has ample authority to interfere. The decisions of this court have been uniform since *In re Ebenhack* was decided, and we prefer to adhere to it.

After a defendant is acquitted, the state is not entitled to a new trial before a jury as to which party must pay the costs. The prosecuting witness is so connected with the state in the trial that after the acquittal of the defendant he cannot demand a retrial upon the evidence before another jury. If costs are improperly taxed by the court after the acquittal of the defendant, of course, a motion can be made for the re-taxation, and a proper inquiry may be had thereon.

In this case, it appears that the district court approved the verdict of acquittal and also the finding of the jury against the prosecuting witness; therefore, in this case, the court below pronounced judgment of acquittal and for the commitment

---

*In re Noonan, Petitioner.*

---

of the prosecuting witness, in accordance with its own opinion — not merely the opinion of the jury.

The motion for a rehearing will be overruled.

---

*In the matter of the Petition of MIKE NOONAN for a Writ of Habeas Corpus.*

47 771  
54 5

**CONTEMPT *in Facie Curie*—Summary Punishment.** When the contempt sought to be punished is committed *in facie curie*, the punishment is summary, and generally immediately follows its commission. (*The State v. Henthorn*, 46 Kas. 613.)

*Original Proceeding in Habeas Corpus.*

THE case is sufficiently stated in the opinion, filed February 6, 1892.

*C. W. Fairchild*, and *S. S. Ashbaugh*, for plaintiff.

*Per Curiam:* It appears from the record in this case that a direct contempt of court was made by the petitioner in the presence of the court. It was said in *The State v. Henthorn*, 46 Kas. 613, that—

“When the contempt sought to be punished is committed *in facie curie*, the punishment is summary, and generally immediately following its commission. In such case no preliminary process or evidence is necessary, except what is gathered by the sense of seeing and hearing. The court takes judicial notice of the offense, and punishes without a hearing of any kind, except in some cases to give the guilty parties an opportunity to apologize, upon which the court may discharge, or it may receive the apology in mitigation of the offense in fixing the punishment.”

Subsequent proceedings were taken before the probate judge of Kingman county, but as that court has original jurisdiction in *habeas corpus* cases, if the district court has in any man-



ner violated its order, this is not the proper court, upon the case as submitted to consider or determine that matter. It is clearly evident that the district court had jurisdiction, and properly performed its duty in punishing the petitioner. When the attention of the probate judge is called to the proceedings before the district court against the petitioner, and our opinion concerning the validity of such proceedings, he will undoubtedly dismiss the case of the petitioner, now pending before him in the *habeas corpus* matter.

The petition will be denied and the prisoner remanded.

---

J. M. MOORE V. THE STATE OF KANSAS, *on the relation of Carrie Vernon.*

**BASTARDY—Residence of Putative Father.** If the putative father of a bastard child is a resident of this state, the mother can institute proceedings against him under our statute, even if the mother and child are residents of another state.

*Error from Wyandotte District Court.*

PROCEEDING under the bastardy act. From a judgment against the defendant, *Moore*, he appeals. The opinion states the facts.

*Hutchings & Keplinger, Buchan, Freeman & Porter, and Scroggs & Gibson*, for plaintiff in error.

*Hale & Fife, Van Hoorebeke & Ford, and M. P. Murray*, for defendant in error.

Opinion by SIMPSON, C.: This a proceeding under the bastardy act. The evidence on behalf of the state having been introduced, the defendant elected to rely on a jurisdictional question presented by the evidence for the state. This question is, whether the courts of this state have any jurisdiction

47	772
66	304
47	772
71	392
47	772
76	355
76	357

---

Opinion of the Court.

---

in a case where the mother and her illegitimate child are and always have been non-residents of the state of Kansas. The jury found specially as follows:

"1. Is Carrie Vernon, the relator, a citizen of the state of Kansas? A. No.

"2. Was the relator, Carrie Vernon, ever a citizen of the state of Kansas. A. Yes.

"3. Was the relator, Carrie Vernon, delivered of a bastard child? A. Yes.

"4. When was said bastard child born? A. 9 P.M. on June 1, 1889.

"5. Where was said bastard child born? A. Carlisle, Clinton county, state of Illinois.

"6. Was said bastard child ever a citizen of the state of Kansas? A. No.

"7. When was said bastard child begotten? A. September 3, 1888.

"8. Where was said bastard child begotten? A. Kansas City, Kansas.

"9. Was the relator, Carrie Vernon, born in the state of Illinois? A. Yes.

"10. Has the relator, Carrie Vernon, always resided in the state of Illinois, except when temporarily absent? A. No.

"11. Where does the said relator, Carrie Vernon, now reside? A. Carlisle, Clinton county, state of Illinois.

"12. Has said bastard child ever since its birth been a resident and citizen of the state of Illinois? A. Yes."

After the jury had returned these special findings, the defendant below made a motion to set aside the answers to questions Nos. 2 and 10, on the ground that said answers were wholly unsupported by evidence. This motion was sustained, and said answers set aside. The jurisdictional question is raised by motion to discharge the defendant, by instructions asked and refused, and by the motion for a new trial. The district court adjudged the defendant to be the father of the bastard child, and that he may be charged with its maintenance and education, and ordered the defendant to pay into court the sum of \$1,200 for that purpose, in definite sums, at stated periods.

The first question to be considered is, the object to be ac-

complished and the results to be attained by proceedings under the bastardy act of this state. These things have been the subject of some comment by this court. The act itself is a strange admixture of criminal process and civil procedure, but has been classified as a civil proceeding. The power exercised by the legislature in the passage of the act, and the proceedings to be taken under it, can be traced on the one hand to the police power of the state, and on the other as conferring personal benefits to private parties. The title to the act is somewhat suggestive of its objects and purpose. It is, "An act providing for the maintenance and support of illegitimate children."

In the case of *In re Wheeler*, 34 Kas. 96, it is said by this court that "the charge of maintenance and education, while it is in the nature of a civil obligation, and imposed in a proceeding which is essentially civil, though criminal in form, is not based upon contract, either express or implied." This means that the proceeding is strictly a statutory one, and whatever rights are created or obligations imposed are by reason of the express terms of the statute. The court also says: "It is the duty of the father to make provision for the support of his illegitimate offspring." That is, the moral obligation is made a legal duty by the words of this statute. The court proceeds:

"To compel him to assist in the maintenance of the fruit of his immoral act, and to indemnify the public against the burden of supporting the child, is the purpose of the proceeding in bastardy."

The case of *Musser v. Stewart*, 21 Ohio St. 353, is cited to support the decision. That case declares—

"That a proceeding in bastardy is not a suit to recover a sum of money owed from the defendant to the complaining party. The liability sought to be enforced is not founded upon contract, express or implied, but originates in the wrongful act of the defendant, against the consequences of which the statute is designed to protect the public."

*Ex parte Cottrell*, 13 Neb. 193, is cited, and that case says:

"The proceeding is properly a police regulation, requiring

---

Opinion of the Court.

---

the putative father to furnish maintenance for the support of his child, and to indemnify the public against liability for its support."

All the books abound in such expressions. It seems, therefore, that bastardy acts such as ours convert the moral obligation of the father of an illegitimate child to support it into a legal duty, enforceable in the courts. Various states prescribe different forms of procedure to enforce this duty, but in all states, so far as we have read the reports of their final tribunals, the avowed purpose of these acts is to prevent the child from becoming a public charge to the county, township or district in which the mother resides. This is generally accomplished by a provision that the mother, if she be a proper person and is in charge of the child, or, if she be not, then some person who is, be paid certain sums at definite periods. And the amounts paid, the times at which paid, and to whom paid, are all questions to be determined by the court. If this is the inducing cause and sole purpose of the legislative act, there is much reason to call it an exercise of the police power of the state, and the public charge to be guarded against could not occur unless the child was a resident of the state. In any view, the mother is benefited, because, so far as the father is compelled to contribute to the maintenance and education of the child, she is relieved from expense. If she is not in the custody of the child, or is adjudged to be not a proper person to have the custody, yet she is relieved from a legal obligation to the extent that support is given the child by the putative father. Hence, it seems to follow from such a construction that the primary object of a bastardy act is to relieve the public of the charge and support of an illegitimate child, and that the benefits derived by the mother from the enforcement of the law are only incidental. These proceedings do not bar or interfere with her right of personal action against the father for the injuries done her. If that is the primary object of a bastardy act, it can only operate within the boundaries of the state in which it originates. If the child is a non-resident, no municipality of this state could be made chargeable with

---

Moore v. The State, *ex rel.*

---

its maintenance. This is too plain to require elaboration. The case of *Sutfin v. The People*, 43 Mich. 37, is one strongly in point. It holds that—

“The main purpose of the Michigan bastardy act is to indemnify the public for the support of the child, and it does not apply to cases where the child lives out of the state, even though it was begotten within the state.”

The court says:

“The proceedings under this act are purely statutory. They are partly for the benefit of the complainant, and may be instituted in her name, and partly for the purpose of indemnifying the public, and may be instituted in the name of the people. The warrant may be executed in any part of the state, and if upon the trial the defendant is found guilty, he shall be adjudged to be the father of the child, and shall stand chargeable with the maintenance thereof, with the assistance of the mother, in such manner as the court shall order. The person so adjudged to be the father shall give bond to the superintendents of the poor of the county, with sufficient sureties, to the satisfaction of the court, to perform such order, and also to indemnify the county which might be chargeable with the maintenance of such child. The mother and superintendents, respectively, may recover from the defendant any sum of money which ought to have been paid them respectively in pursuance of such order of the court; and the superintendents are given power to compromise and arrange with the father relative to the support of such child, and thereupon to discharge him from all liability for the support of such bastard. It seems very clear, indeed, from these several provisions, that the support of the bastard child, and thereby to prevent its becoming a charge upon the public, is the primary object and purpose of the act. In so far as the putative father is required to contribute to its support, it is a benefit to the mother; but for the performance of such order a bond is given to the superintendents of the poor, and to indemnify the county which might be chargeable with the maintenance of the child. These two things go hand in hand together. Where the mother and child are actual residents of another state, or of a foreign country, it surely could not have been intended that the bond to the superintendents would be for the indemnity of the county where the mother and child resided; nor could it have been intended to meet a contingency that might never happen, by a change

## Opinion of the Court.

of residence to the county in this state where the proceedings were instituted, or any county into which the parties might come. The statute is designed to meet cases where the child is a resident of this state, and cannot be held applicable to cases like the present. The benefit to the mother of the child which this act contemplates is secondary only. She may have her personal action against the father of the child for her injuries, and the proceedings under this act would be no defense in such an action."

In the case of *Graham v. Monsergh*, 22 Vt. 541, Redfield, J., speaking for the court, says:

"This is a complaint and proceeding under the statute in regard to bastards and bastardy. The important facts admitted on the record are, that the child, which is confessedly not legitimate, was begotten and born out of the state, and the parties never resided in the state, the mother only being temporarily here at the time the proceedings were instituted. The child resided, or was in the keeping of a family which resided, in Derby, in this state, at the time of the trial. The court are well agreed that a proceeding for the purpose of affiliating a bastard child and compelling aid from the father in its support is, in its nature, confined to causes of action accruing within the state. The remedy is a peculiar one, and given and regulated exclusively by statute, and has no fair or reasonable application to causes of action accruing out of the state. And, if we allow a case which accrued in a neighboring state or province to be brought into our courts, we could not exclude such a case coming from Japan, or farther India, or Kamtchatka. Or, if we admit such cases to come into our courts from countries where similar laws exist, we must, equally, from countries where no such laws exist; and, for aught we can perceive, from those countries where polygamy is allowed to the fullest extent. We should thus be liable to become engaged in a species of knight-errantry, in a ludicrous attempt to redress the wrongs and regulate the police of other countries in matters which very little concern us. The truth is, the proceeding is altogether a matter of internal police, and in its very nature as exclusively local as is the administration of criminal justice.

"It is not necessary here to consider how far the case of a woman *bona fide* coming into this state to reside, before the birth of the child, might merit a different consideration. It

is supposable, too, that, should the birth of such a child occur during the temporary absence of the mother from the state, with the continuance of the *animus revertendi*, she might, on her return to the state, be entitled to proceed against the father under these statutes."

This case is expressly affirmed by an opinion of Redfield, C. J., in *Egleson v. Battles*, 26 Vt. 548.

The case of *The State v. Helmer*, 21 Iowa, 370, is one in which an action was commenced on the transcript of a judgment in a bastardy proceeding in the state of Indiana, in Linn county, in the state of Iowa. An exemplified copy of the judgment, duly authenticated, was all the evidence introduced at the trial; there was an objection to the sufficiency of the evidence, and the supreme court of Iowa, by Cole, J., says:

"It is claimed that the subject-matter of the action is one of merely local police regulation in the state of Indiana, under its laws, and that it is not competent for the courts of another state to undertake its enforcement. There is much of truth in the legal proposition upon which this claim rests; but the error is in its application. If the mother of the bastard child, begotten and born in the state of Indiana, has come to Iowa and sought by legal proceedings to compel the defendant, its father, to support it, and to give bond therefor, and otherwise comply with the requirements of the statutes of Indiana, the answer of the defendant, that the subject-matter of such action was one of merely local police regulation of Indiana, not enforceable in this state, would have been conclusive and amount to a complete defense. (*Graham v. Monsergh*, 22 Vt. 543.) Such an action can no more be sustained beyond the limits of the sovereignty within which it arose than can an action for any other penalty provided by statute of such sovereignty for the wrongful act of a defendant therein. Both are alike matters of local, internal police, and enforceable alone by the sovereignty making the regulation and providing the penalty. But where the local jurisdiction has attached, and the courts of that state or sovereignty have properly taken cognizance of the matter, and rendered judgment for such penalty, such judgment is entitled to 'full faith and credit' in every other state."

In the case of *Richardson v. Overseers of Poor*, 33 N. J.

---

Opinion of the Court.

---

Law, 190, it is held that a bastard child, whose mother before its birth moved out of the state, and who, with her child, has ever since continued to reside in another state, is not chargeable upon any township in this state. At common law, the duty of supporting the bastard child is upon the mother, and not on the father. The father cannot be held liable to contribute to its support except as made so by statutory proceedings, and hence it is held by another line of decisions that the principal reason for the existence of the statute is to make the moral obligation of the putative father to support the illegitimate child a legal duty, and this is done for the benefit of the child, and not the mother. (*Carter v. Krise*, 9 Ohio St. 405; *Perkins v. Mabley*, 4 id. 669; *Musser v. Stewart*, 21 id. 356; *Cottrell v. State*, 9 Neb. 125.)

In the case of *Mc'Gary v. Bevington*, 41 Ohio St. 280, the court says:

"The bastardy act of February 2, 1824, (Swan's Statutes, 124,) provided, 'that on complaint made to any justice of the peace in this state by any unmarried woman resident therein,' the justice should issue his warrant for the arrest of the accused. This statute in terms required that the complainant should be a resident of the state. Subsequent sections of the statute provided for giving bond to the trustees of the township in which the child was born, conditioned that it shall not become a township charge. In 1873, (70 Ohio Law, 111,) this statute was so changed as to provide, 'that when any unmarried woman who has been delivered of, or who is pregnant with a bastard child, shall make complaint thereof in writing under oath before a justice of the peace,' the justice shall issue his warrant for the arrest of the accused. And the second section provided, that when the person accused was arrested and brought before the justice, a compromise might be made by the complainant and the accused, and that when 'the party accused shall pay or secure to be paid to the complainant such sum of money or other property as she may agree to receive in full satisfaction, and shall, further, give bond to the trustees of the township in which such complainant shall reside, conditioned to save such township free from all charges toward the maintainance of said child, the justice shall discharge the party accused out of custody.



---

Moore v. The State, *ex rel.*

---

"The fourth section of this act preserves the local nature of the proceeding, by the provision that in a certain case the justice may bind the accused in a recognizance to appear at the next term of the court of common pleas in a sum not less than \$300 nor more than \$600, for the benefit of the township in which such bastard child shall be born, to answer such accusation. The second, third and fourth sections of this act are similar to corresponding sections of the act of 1824. And while the requirement that the complainant shall be a resident of the state is left out of the first section, the local features of the act in other respects remain.

"The Revised Statutes, §§ 5614-5638, have none of the local features of the older statutes. The complaint may be made by an unmarried woman who has been delivered of or who is pregnant with a bastard child. All recognizances for the appearance of the accused party, and all security for the maintenance and support of the child, are required to be given for the benefit of any county, township, or municipal corporation within the state in which such bastard child may become a charge. This radical change of a statute which authorized a proceeding to be commenced only by a resident of the state, and in which many of the objects of the proceeding were for the benefit of the township in which the mother resided, or in which the child was born, into a proceeding without limitation as to residence of the complainant, and in which the remedy provided are for any locality that may become interested in the support of the child, has enlarged its application to any case in which jurisdiction of the defendant or his property may be had within the state. Casting off the limitations that formerly surrounded the proceeding is only following the changes in the statutes.

"Residence in the state, when the cause of action arose, or when proceedings are commenced, is not necessary to maintain any other kind of action or proceeding. In many cases the same action or proceeding may be maintained in any state, depending altogether what the fact is as to the place where the defendant may be summoned or jurisdiction otherwise acquired of the person. If the complainant in bastardy, although the child was begotten and born in another state, and the mother and child still remain residents of such state, can, by coming into this state, get jurisdiction of the defendant under our statute, there is nothing in the statutes, nor in the reason or purpose of the proceeding, to hinder her from maintaining the proceeding here."

---

Opinion of the Court.

---

In Illinois, in the case of *Kolbe v. The People*, 85 Ill. 336, it is said:

"This is a proceeding under our statute on the subject of bastardy. The child was begotten in Missouri, where the complainant, the putative father, then resided. When near the time of the confinement of the mother, the putative father removed to the state of Illinois. The mother, while pregnant, came into the state of Illinois and into the county where the putative father was found, and instituted the proceedings before a justice of the peace of that county. The case came in regular course before the circuit court, where judgment was rendered against the putative father. He appeals to this court. Appellant insists that the circuit court erred in refusing to dismiss the proceeding for want of bond for costs. The statute requiring bond for costs is not applicable to a proceeding of this kind; and, if it were, the application, not having been made before the justice of the peace, comes too late. The ruling was right.

"A graver question is presented by the objection that the complainant was not a resident of the state of Illinois, and never has been. It is strenuously insisted that this statute was enacted in the interest of the public, and for the protection of the proper county against its liability to the expense of maintaining the child as a pauper.

"The language of the statute is broad, and contains no express limitation of the kind insisted upon. The case is certainly within the letter of the law. The majority of the court do not feel at liberty to hold that the operation of the statute is limited in this respect by such implication. While the statute is in the interest of the public in some respects, still, the main purpose of the statute seems to be to compel the father of a bastard child to bear part of the burden of its support. In this, the mother is chiefly interested.

"We think the proceeding, as it is, was authorized by the statute. The judgment is therefore affirmed."

This case is affirmed in the case of *Mings v. The People*, 111 Ill. 98.

In *Hauskins v. The People*, 82 Ill. 193, the court declares that—

"The foundation of the action is not to punish the defendant for an immoral or an unlawful act, but to compel a father to contribute to the support of his offspring. If the sole ob-

---

Moore v. The State, *ex rel.*

---

ject of the act is to compel a father to support his illegitimate child, it must be that the action is transitory, and not local, and that it could be maintained in any jurisdiction within which the putative father can be found."

The case of *Duffies v. The State*, 7 Wis. 672, proceeds upon a theory somewhat different from the other cases before cited. The court says:

"This was a complaint and proceeding instituted under chapter 31 of the Revised Statutes in regard to the support of bastards. The testimony in the case showed that the child was begotten in the town of Dover, in the county of Racine, and that the mother went to Illinois, and was residing in Bloomington, in that state, at the birth of the child, and continued to reside there until the child was two years old, when she returned to this state, and instituted this proceeding for the purpose of affiliating a bastard child, and compelling the father to aid in its support. It is now insisted by the counsel for the plaintiff in error, that the settlement of the child is in Illinois, and that this proceeding will not apply to a case when the mother was residing in another state at the time of the birth of the child. In support of this position, we have been referred to the cases of *Graham v. Monsergh*, 22 Vt. 543; *Egleson v. Battles*, 26 id. 548.

"The obligation of the father to support a bastard child grows out of the paternal relations existing between him and such child; and we therefore deem it quite immaterial, so far as his obligation and duty are concerned, whether the child is born out of the state or not. The object of the statute is to save the public from the burden of supporting illegitimate children by compelling the father to provide for their maintenance. It is the father's duty to support his children, legitimate or illegitimate, and because he is likely to neglect it in the latter case, the law enforces the obligation by proceedings under bastardy acts. This is the ground upon which these statutes are founded. What difference can it make to any county or town in this state, which is about to be burdened with the support of an illegitimate pauper child, whether the child was begotten and born in such county or town or in England or Germany? If the father is within the state, where he can be held amenable to our laws, and in a town or county where the child is likely to become a charge, it is right and proper that he should support his own offspring, and the

---

Opinion of the Court.

---

law will compel him to do so. The accident of the birthplace of such child ought not to be permitted to affect this general universal obligation growing out of the paternal relation. We are therefore unable to concur in the reasoning of the courts in Vermont, where it has been held that a bastard child, born out of the state, its mother at the time having no domicile in the state, cannot be affiliated, or its maintenance charged upon the father under the bastardy act."

It seems to us, from a careful reading and comparison of these various decisions, that they are greatly controlled by the views of the different courts as to the main object and purposes of their various statutes. The courts that hold that the principal object of the statute is to prevent illegitimate children from becoming a charge say that the proceedings are local; while the other courts that hold the purpose of the statute to be to convert the moral obligation into a legal duty say they are transitory. When the question is historically examined, it will be found that originally the overseers of the poor were alone empowered to commence and maintain such proceedings. But the universal tendency has been in all this legislation everywhere to gradually give to the mother the sole power to institute these proceedings, and the practical result of such a tendency is to accomplish all the purposes contemplated. The enforcement of the statute by the mother both protects the municipality from the burden and makes the putative father contribute material aid to the mother in the maintenance and education of their illicit offspring. Our legislation has partaken very largely of this tendency. It seems that such proceedings can be instituted alone on the complaint of the mother. The money is to be paid to her, unless it appears that she is an improper person. She can at any time dismiss the suit, if she enters of record an admission that provision has been made for the maintenance of the child to her satisfaction. Such an entry is a bar to all other prosecutions for the same cause and purpose. Sections 19 and 21 of the act seem to be conclusive against the view that the sole purpose of the proceeding is to protect the public, for it provides that

"in case of the death of the putative father of such child, the right of action shall survive against his personal representatives, and the death of the bastard child shall not cause the abatement of the proceedings." If the sole or principal object of the statute is to protect the public from the maintenance of the child, the proceedings would abate with the death, for with the death the necessity for the statute would cease to exist. Very strong support of this view is found in the act repealed by the statute we are now considering. The act repealed (chapter 109, Laws of 1859) provided, that on complaint of any woman, resident in this territory, the putative father of a bastard child could be arrested, and if the accused would pay, or secure to be paid, to the woman such a sum of money as she would agree to receive in satisfaction, and would give bond to the trustee of the township in which said complainant shall reside, conditioned to save such township free from all charges for the maintenance of the child, then the accused shall be discharged. Another section provides, that if the woman neglects to bring a suit for the maintenance of the child, or commences a suit and fails to prosecute it to final judgment, the township trustees may bring such a suit. Under the act now in force, the unmarried woman, who is now alone empowered to commence proceedings, is not required to be a resident; neither does the act authorize any county or township interference with the proceedings at any stage, but gives the mother the sole right to institute, control and dismiss the action.

We are forced to the conclusion, that if the putative father of a bastard child is a resident of this state, the mother can institute proceedings against him under our statute, even if the mother and child are residents of any other state.

We recommend that the judgment of the district court be affirmed.

By the Court: It is so ordered.

All the Justices concurring.

# INDEX.

## A.

ABANDONMENT—SEE "HOMESTEAD," 3, 5.

ABSCONDING AND CONCEALING—SEE "FRAUD," 5.

### ACCOUNT-BOOKS :

*Taking Books to Jury-Room.* Whether the jury should be allowed to take to their room when they retire for consultation the account-books of a partnership, is a question resting largely in the discretion of the trial court, and to reverse a judgment for that reason it must affirmatively appear that such discretion has been abused. *Wood v. Wood*..... 617

### ACTION :

1. *Arrest—Action on Bond—Appeal—Supersedeas.* The institution of proceedings in error in the supreme court, and the giving of a *supersedeas* bond, under §§ 551 and 552 of the code, will not prevent the plaintiff below from maintaining an action upon a bond given to secure the discharge of the defendant from arrest in the original case. A *supersedeas* bond only stays the execution of a judgment or final order sought to be reversed. (*C. B. U. P. Rld. Co. v. Andrews*, 34 Kas. 563, followed.) *Heizer v. Pawsey*..... 88
2. *Dangerous Machine—Owners Liable for Loss of Hand.* When the owners of a horse-power threshing-machine are guilty of gross negligence by leaving the bevel-wheel and cogs uncovered, knowing them to be imminently dangerous to human life and limb in this uncovered condition, and a workman engaged in threshing with the machine in this condition attempts to oil the cylinder without the knowledge of the uncovered condition of the bevel-wheel and cogs, and in this attempt loses his hand, the owners of the machine are liable for damages occasioned by such injury. *Mastin v. Levagood*..... 86
3. *Duty of Actor.* In any voluntary act which may naturally result in the injury of another, the actor must see to it, at his peril, that injury does not follow, or he must respond in damages therefor. *Id.*..... 36
4. *Trespass—Local Action.* The action of trespass to real estate is a local action. *Brown v. Irwin*..... 50
5. *Bill of Particulars—Practice.* Where a bill of particulars states an action in trespass *quare clausum fregit* only, and the bill of particulars also shows that the action arose in the state of Nebraska, it is error to overrule a demurrer to such bill of

## ACTION — CONTINUED:

- particulars on the ground that it does not state a cause of action. *Id.*..... 50
6. *Payment for Services.* Where services have been actually rendered to another under a verbal agreement, not binding upon the parties on account of the provision of § 6, ch. 43, requiring the agreement to be in writing if not to be performed within one year, the party benefited thereby may be compelled to pay for the same. *Aiken v. Nogle*..... 96
7. *Void Appointment.* Where a judge of the district court, by an order made at chambers, attempted to appoint a receiver on the 19th day of April, in an action that was not commenced until the 14th day of May of the same year, such appointment is absolutely void. *Guy v. Doak*..... 236
8. *Railroad Stock Law—Action, Where Brought.* In an action brought under the railroad stock law of 1874, it is essential to allege that the stock was killed or injured in the county in which the action was brought. But where the plaintiff alleges that the defendant company owned and operated the road over and across the plaintiff's premises in Reno county, and that the defendant killed the plaintiff's cow "on the said railway track of said defendant and by the operation of said railway," and no other railroad or railway track is mentioned in the pleadings except the one through the plaintiff's farm, the pleadings sufficiently show that the accident occurred in Reno county, where the action was brought. *N. & C. Rly. Co. v. Gibbs*..... 274
9. *Cow Killed—Action Maintained.* Where a railroad company owns and operates a railroad, the construction of which is not entirely finished, and while so operating the road permits the contractor who constructed the road to run his construction train over the road so owned and operated by the company, and which at the time is unfenced, and a cow is killed by the construction train in consequence of the omission to enclose the road with a fence where it could have been fenced, an action may be maintained against the railroad company to enforce the statutory liability for the loss of the cow. (*Railroad Co. v. Ewing*, 23 Kas. 273; *Railway Co. v. Wood*, 24 id. 619.) *Id.*.. 274
10. *Written Memorandum, not Enforced.* If the owner of land signs a writing or memorandum, wholly executory, agreeing to convey the land therein named to W., who does not sign by himself or agent, and W. does not take possession of the land, or in any other way make part performance, W. cannot be charged in an action upon the writing or memorandum which he has not signed. *Guthrie v. Anderson*..... 383
11. *Death of Party—Revivor of Action.* The statute provides that an order to revive an action upon the death of either the plaintiff or defendant cannot be made after the expiration of one year without the consent of the opposite party. *Bradford v. Loan Co.*..... 587
12. *Res Judicata—Merger.* An action instituted in another state to have certain conveyances set aside, and subject the property described therein to the payment of the plaintiff's judgment and the claims of all other creditors who might come and set up their demands, is not a bar to an action brought by one of such creditors in this state upon a promissory note owned by

## ACTION—CONTINUED:

- him, notwithstanding the fact that he appeared in the former action, filed a cross-petition, and obtained a finding from the court of the amount due him upon his note, but did not obtain a personal judgment against the defendant in that action, nor receive anything from the sale of the property affected by such proceeding. To constitute a merger, there must be a valid and subsisting judgment rendered on the cause of action. *Cackley v. Smith*..... 642
18. *Justice of the Peace—Practice.* The plaintiff commenced an action before a justice of the peace upon an account duly verified under § 84 of the justices' act, and no denial of the account, verified by affidavit or otherwise, was ever interposed. The justice, in the absence of the plaintiff, sustained a motion of the defendants to dismiss the action for want of prosecution, but within five minutes thereafter and before he entered the order of dismissal upon his docket, set aside the order of dismissal and overruled the defendants' motion, and set the case down for trial at a later hour of the same day, and the defendants' attorney had full notice thereof, and the justice afterward rendered judgment in favor of the plaintiff and against the defendants for the amount of the plaintiff's account. *Held*, No material error was committed as against the defendants. *Sullivan v. Brown*..... 708
14. *Warranty—Action for Breach—Amendment of Petition.* The plaintiffs commenced an action against the defendant for damages resulting from the purchase and sale of a horse which was purchased by the plaintiff and sold by the defendant for a particular purpose, but was worthless for that purpose; and this transaction was brought about by the wrongful statements of the defendant. Afterward the court permitted the plaintiffs to so amend their petition as to show that these wrongful statements included an express warranty that the horse was fit for the purpose for which he was bought and sold, but at the same time imposed upon the plaintiffs substantially all the costs made in the case up to the time of making the amendment. *Held*, That the court did not err in permitting the amendment. *Culp v. Steere*..... 746, 747
15. *Not Barred.* The action was brought within proper time so as not to be barred by any statute of limitations, but the amendment was not made until more than three years had elapsed after the purchase and sale of the horse, and the plaintiffs recovered in the action. *Held*, That the cause of action upon which the plaintiffs recovered was not barred by any statute of limitations. *Id.*..... 747
16. *Master and Servant—Dangerous Machinery—Liability for Damages.* When the owners of a horse-power threshing-machine are guilty of gross negligence by leaving the bevel-wheel and cogs uncovered, knowing them to be imminently dangerous to human life and limb in this uncovered condition, and a workman engaged in threshing with the machine in this condition attempts to oil the cylinder without the knowledge of the uncovered condition of the bevel-wheel and cogs, and in this attempt loses his hand, the owners of the machine are liable for damages occasioned by such injury. *Mastin v. Levagood*..... 764



## ACTION — CONTINUED:

17. *Bastardy — Residence of Putative Father.* If the putative father of a bastard child is a resident of this state, the mother can institute proceedings against him under our statute, even if the mother and child are residents of another state. *Moore v. The State, ex rel.*..... 772

## ACTION BY SUBCONTRACTOR—SEE “MECHANICS’ LIEN,” 1.

## ADMINISTRATION:

1. *Right to Partnership Property—Surviving Partner.* The administratrix of the estate of a deceased member of a copartnership consisting of two persons has no legal right to take the possession of the property of the partnership from the surviving partner until such surviving partner has been cited for that purpose, and neglects or refuses to give the bond required by § 2817, General Statutes of 1889, and until the administratrix of the undivided estate of the deceased partner has given the further bond required by § 2820, General Statutes of 1889. *Teney v. Laing*..... 297
2. *Erroneous Proceedings by Administratrix.* When the administratrix of the estate of a deceased member of a copartnership consisting of two persons, without citing the surviving partner, and without executing the further bond, commences proceedings in the probate court under §§ 2982, 2983, 2984, 2985, 2986, or under §§ 2821 and 2822, against the surviving partner and other persons, to get possession and control of the partnership property, it is error not to dismiss such proceedings on motion made for that purpose. *Id.*..... 297

## ADMISSIONS—SEE “PLEADING AND PRACTICE,” 39.

## ADOPTION—SEE “PROBATE COURT.”

## AFFIDAVIT:

1. *Nature of Action—Statement in Affidavit.* In an action to foreclose a mortgage based on service by publication only, the affidavit to obtain the same alleged that personal service could not be made upon the defendant within the state, and “that this is an action brought for the recovery of real property under a mortgage, situated in said county of Lyon,” and it was contended that the affidavit did not sufficiently state the nature of the action. *Held*, That it is imperfect in this respect, but not so defective as to render a judgment based thereon null and void or subject to a collateral attack. *Shippen v. Kimball*.... 173
2. *Service by Publication.* Before service can be made by publication, an affidavit must be filed stating that the plaintiff is unable to make service of the summons upon the defendant, and that the case is one of those mentioned in § 72 of the civil code. Without such an affidavit, the attempted service by publication is insufficient. *Grouch v. Martin*..... 313  
See “ATTACHMENT,” 8.

## AGREEMENT—SEE “CONTRACT.”

## AGREEMENT TO RECONVEY—SEE “CONTRACT,” 23.

**AGRICULTURE:**

*State Board—County Society—Appropriation.* In order to entitle a county or district agricultural society to representation in the state board of agriculture, the reports prescribed in § 2 of the act for the encouragement of agriculture (Gen. Stat. of 1889, ¶ 6250) must have been made; and unless these reports have been made at the times and in the manner required, such society is not entitled to demand an appropriation of the public moneys of the county, such as is provided for in § 8 of the act mentioned. *Fair Association v. Thummel*..... 182

**ALIENATION—SEE "HOMESTEAD," 4.**

**AMENDED INFORMATION—SEE "CRIMINAL LAW," 12.**

**AMENDMENT:**

1. *Petition in Error—Amendment, When.* A petition in error in the supreme court may be amended more than one year after the ruling of the district court complained of has taken place, if the amendment is only to make good a defective, informal or incomplete allegation of error already contained in the petition in error; but when the proposed amendment sets forth an absolutely new and distinct allegation of error or cause for reversal, it cannot be made after that time. *Cogshall v. Spurry*, 448
2. *Petition.* The petition in this case examined, and held, that the petition might have been amended on the trial to conform to the facts proven, and that this court will treat it as having been thus amended, and will not reverse the case because of a variance between the petition and the facts proven and the judgment rendered thereon. *Tipton v. Warner*..... 606
3. *Motion to Make Definite.* A motion made by the defendant to require the plaintiff to so amend his pleading as to make it more definite and certain is generally made too late when it is not made until after the case is called for trial. *St. L. & S. F. Rly. Co. v. Snavelly*..... 637
4. *Warranty—Action for Breach—Amendment of Petition.* The plaintiffs commenced an action against the defendant for damages resulting from the purchase and sale of a horse which was purchased by the plaintiff and sold by the defendant for a particular purpose, but was worthless for that purpose; and this transaction was brought about by the wrongful statements of the defendant. Afterward the court permitted the plaintiffs to so amend their petition as to show that these wrongful statements included an express warranty that the horse was fit for the purpose for which he was bought and sold, but at the same time imposed upon the plaintiffs substantially all the costs made in the case up to the time of making the amendment. Held, That the court did not err in permitting the amendment. *Culp v. Steers*..... 746, 747
5. *Action, not Barred.* The action was brought within proper time so as not to be barred by any statute of limitations, but the amendment was not made until more than three years had elapsed after the purchase and sale of the horse, and the plaintiffs recovered in the action. Held, That the cause of action upon which the plaintiffs recovered was not barred by any statute of limitations. *Id.*..... 747

AMENDMENT OF MOTION—SEE "PLEADING AND PRACTICE," 69.

AMENDMENT OF PETITION—SEE "AMENDMENT."

AMENDMENT OF CROSS-PETITION—SEE "PLEADING AND PRACTICE," 64.

ANTI-TRUST LAW—SEE "STATUTE," 4.

APPEAL—SEE "PRACTICE, SUPREME COURT."

#### APPEAL BOND:

*Mandamus to Justice — Approval of Appeal Bond.* Where an appeal bond is tendered to a justice of the peace without any justification by the sureties thereon, and the justice is unacquainted with them or with their qualifications and objects to their sufficiency, it is the duty of the party presenting the bond to satisfy the justice by affidavit or other proof of their qualifications; and when this is not done, and the bond is not approved, the justice will not be compelled by *mandamus* to approve the bond after the expiration of the time for appeal, although it then appears that the sureties first offered possessed the requisite statutory qualifications. *C. K. & N. Rly. Co. v. Marshall* ..... 614

#### APPROPRIATION:

*Agriculture — State Board — County Society.* In order to entitle a county or district agricultural society to representation in the state board of agriculture, the reports prescribed in § 2 of the act for the encouragement of agriculture (Gen. Stat. of 1889, § 6250) must have been made; and unless these reports have been made at the times and in the manner required, such society is not entitled to demand an appropriation of the public moneys of the county, such as is provided for in § 8 of the act mentioned. *Fair Association v. Thummel*..... 182

ASSESSMENT—SEE "INSURANCE," 2.

ASSIGNMENT—SEE "PROMISSORY NOTE," 5.

#### ASSIGNMENT FOR BENEFIT OF CREDITORS:

1. *Preferences.* A debtor in failing circumstances, engaged in making a general assignment of his property for the benefit of all his creditors, cannot at the same time make valid preferences of certain of his creditors, by chattel mortgages or otherwise. *Hardware Co. v. Implement Co.*..... 423
2. *Certain Creditors not Entitled to Preference.* Where an insolvent debtor commences the preparation of chattel mortgages to prefer certain creditors, but while writing such chattel mortgages, and before the execution of the same, determines to make a general assignment of all his property for the benefit of his creditors and selects his assignee therefor, and then proceeds to execute his chattel mortgages to prefer certain creditors, and at once completes his deed of assignment in accordance with his previous resolution, the making of the chattel mortgages and the execution of the deed of assignment will all be treated as a simultaneous or continuous act, and the creditors named in the chattel mortgages will not be entitled to any preference. The case of *Bailey v. Manufacturing Co.*, 32 Kas. 78, referred to and commented on. *Id.*..... 423

## ASSIGNMENT FOR BENEFIT OF CREDITORS—CONTINUED:

3. *Mortgages—Preference of Creditors.* Where a deed of assignment and certain mortgages were in contemplation at the same time, and the preparation of all commenced and proceeded together, and all were executed and completed substantially at the same time, the preparation and execution of all must be treated as a simultaneous, continuous and single act, and no preference can be rightfully claimed under the mortgages. (*Hardware Co. v. Implement Co.*, ante, p. 423, followed.) *Watkins National Bank v. Sands*..... 591
4. *Not Defeated—Good Faith.* In the deed of assignment the conveyance was made in general terms, descriptive of all the property of the debtor not exempt by law, and it also contained a provision for the *pro rata* distribution of the proceeds among all the creditors; and it further provided that the conveyance was made subject to the mortgages executed contemporaneously with the deed of assignment. *Held*, That the assignment, having been made in good faith, and in terms so as to convey all the property of the assignor for the benefit of all his creditors, the reference to the mortgages, although inoperative and void, is not of itself sufficient to defeat the assignment. The testimony examined, and found to be sufficient to sustain the ruling of the court in vacating and discharging an attachment. *Id.*..... 591

## ASSUMPTION OF RISK—SEE "RAILROADS, AND RAILROAD COMPANIES," 11.

## ATTACHMENT:

1. *Fraudulent Conveyance—Sufficient Grounds.* Where an insolvent debtor, being pressed by his creditors, executes a chattel mortgage upon his personal property to pay or secure for his attorney \$500, most of which is in consideration of future legal services, such mortgage is an unlawful withdrawal of that which justly belongs to the *bona fide* creditors of the insolvent debtor, and operates to delay and defraud his creditors in the collection of their debts. The execution and delivery of such a mortgage furnish sufficient ground for the issuance of an attachment against him. *Shellabarger v. Mottin*..... 451
2. *By Chattel Mortgagor.* A creditor holding a chattel mortgage, as security for his debt, upon property belonging to the debtor, can maintain an attachment against the same and other property of the debtor. *State Bank v. Mottin*..... 455
3. *Partial Discharge.* But if such a chattel mortgage is ample security to pay the creditor's claim in full, together with the interest and costs, the district court, or judge thereof, may, upon proper application therefor, discharge so much of the property not included in the chattel mortgage as is not necessary to satisfy the claim of the creditor. *Id.*..... 455
4. *Waiver of Irregularities.* In an action on an account not due, the defendants made a general appearance, and filed a motion to dissolve the attachment, for the reason that the grounds set forth in the affidavit for the attachment were false. This motion was overruled, and the facts necessary to give jurisdiction in such actions thereby established. In the motion to dissolve the attachment, no irregularity in the issue and service of the

## ATTACHMENT—CONTINUED:

- order of attachment was stated or insisted upon. *Held*, That all questions of irregularity were waived. *Hillyer v. Biglow*... 473
5. *Liens—Priority*. Three several orders of attachment levied on a stock of merchandise on the 30th day of October create a lien prior to and superior to that of a chattel mortgage filed in the office of the register of deeds on the 1st day of November of the same year. *Boot and Shoe Co. v. Ware*..... 483
6. *Sheriff—Conversion—Responsibility*. A sheriff, being in the actual possession of a stock of goods by virtue of a levy made in pursuance to three several writs of attachment in his hands, is not responsible to a subsequent chattel mortgagee for conversion, when a receiver duly appointed by the court from which the orders of attachment issued takes exclusive control and possession of the same, and sells and receives the proceeds. *Id*..... 483
7. *Case, Followed*. The case of *Watkins National Bank v. Sands*, just decided, referred to and followed. The evidence in the present cases examined, and *held*, that under such evidence the decision of the district court discharging the attachments must be affirmed. *National Bank v. Sands*..... 596
8. *Dissolution—Affidavits as Evidence—Notice*. The defendant in an attachment action moved to dissolve the attachment because the grounds laid for the same were untrue, and at the same time made and filed an affidavit alleging that the grounds were untrue, but he did not state in his notice to plaintiff that affidavits would be used on the hearing of the motion. At the time set for the hearing plaintiff asked and obtained a continuance of the hearing to enable him to procure evidence to resist the motion and affidavit of defendant. At the final hearing the affidavit mentioned was admitted in evidence over the objection of plaintiff. *Held*, That the defendant's failure to state in his notice that affidavits would be used on the hearing did not render the reception of the affidavit prejudicial error. *Drug Co. v. Malm*..... 762

See "ASSIGNMENT FOR BENEFIT OF CREDITORS," 4.

ATTORNEY—SEE "CONTRACT," 12.

ATTORNEY'S FEE—SEE "RAILROADS, AND RAILROAD COMPANIES," 23.

## B.

BAILMENT—SEE "REPLEVIN," 3.

## BANKS:

1. *Transfer to Avoid Taxation—Evidence—Finding*. Whether a resolution of the directors of a national bank made on the 28th day of February, declaring a dividend of \$40,000, payable out of the surplus, to be placed to the credit of stockholders' account, and to remain as a deposit until otherwise ordered, is a mere subterfuge to avoid taxation on the 1st day of March following, or is made in good faith, is a question of fact to be determined by the trial court; and that court having heard the testimony of witnesses and made a finding in favor of the good faith of the transaction, and there being some evidence to sup-

**BANKS—CONTINUED:**

port such finding, it will not be disturbed by this court. *Pol-  
lard v. National Bank*..... 408

2. *Taxation of Banks—Injunction.* Where a bank, organized and existing under the laws of the state, having a capital stock of \$50,000, divided into 500 shares of \$100 each, which are held by various individual stockholders, makes a return to the proper assessor, verified by the oath of its president, showing that the bank is the owner of stock in a company or corporation of the actual value of \$22,000, and thereafter such return is properly filed in the office of the county clerk, and upon such return taxes are assessed and levied against the bank, *held*, that the bank cannot perpetually enjoin the collection of such taxes so levied upon the stock returned by it, upon the ground that the capital stock of the bank is held by individual stockholders. In such a case, no showing for equitable relief on the part of the bank is presented, as the assessment and levy of the taxes complained of were induced solely by the action of the bank. *Win-  
field Bank v. Nipp*..... 744

**BANKING BUSINESS—SEE "WILL."****BASTARDY:**

*Residence of Putative Father.* If the putative father of a bastard child is a resident of this state, the mother can institute proceedings against him under our statute, even if the mother and child are residents of another state. *Moore v. The State, ex rel.*..... 772

**BILL OF EXCEPTIONS—SEE "PRACTICE, DISTRICT COURT," 2.****BILL OF PARTICULARS—SEE "JUSTICES, AND JUSTICES' COURTS," 3.****BONA FIDE PURCHASER—SEE "VENDOR AND VENDEE."****BOND—SEE "OFFICE AND OFFICER," 3.****BREACH—SEE "CONTRACT," 2, 3, 4, 11.****BRIDGE:**

*County Bridge—Tax—Void Levy.* The levy of a 1-mill tax for building county bridges, the cost of which is payable out of the fund provided for the current expenses of the county, where the levy for county expenses is already up to the limit allowed by statute, is unauthorized and void. *A. T. & S. F. Rld. Co. v. Comm'rs of Atchison Co.*..... 722

**BURDEN OF PROOF—SEE "ERROR," 8; "PLEADING AND PRACTICE," 38.****C.****CANCELLATION OF POLICY—SEE "INSURANCE," 5.****CARE AND DILIGENCE—SEE "DAMAGES," 4, 5, 6, 9.****CARRIER—SEE "RAILROADS, AND RAILROAD COMPANIES," 1, 28, 29.**

## CASE-MADE:

1. *Evidence — Certified Paper not a Part of Case-made.* Where a case is made for the supreme court, and such case is settled and signed by the judge of the district court, and attested by the clerk thereof, and attached to such case is a paper containing what purports to be the evidence introduced on the trial in the district court, and it is certified to be such by the official stenographer of the court, and such evidence is not otherwise identified or authenticated. *held*, that it cannot be considered as any part of the case-made. *Mullaney v. Humes*..... 99
2. *Review — Evidence not Duly in Record.* Evidence purporting to have been given on the trial of a case, and certified to by the official stenographer and by the clerk of the district court to be true and correct, and attached to a transcript brought to the supreme court, forms no part of the record, and cannot be considered unless it is preserved either by a bill of exceptions or case-made. *Hopkins v. Hopkins*..... 103

## CASES AFFIRMED:

Aikman v. School District, 27 Kas. 129.....	106
Alexander v. Shonyo, 20 Kas. 705.....	360
Allen v. Fuget, 42 Kas. 672.....	597
Anderson v. Beebe, 22 Kas. 768.....	24
Andrews v. Love, 46 Kas. 264.....	289
Angell v. Martin, 24 Kas. 334.....	589
A. T. & S. F. Rld. Co. v. Comm'rs of Jefferson Co., 12 Kas. 127.....	767
A. T. & S. F. Rld. Co. v. Morgan, 42 Kas. 23.....	445
A. T. & S. F. Rld. Co. v. Plunkett, 25 Kas. 188.....	115
A. T. & S. F. Rld. Co. v. Pracht, 30 Kas. 71.....	69
A. T. & S. F. Rld. Co. v. Rockwood, 25 Kas. 302.....	69
A. T. & S. F. Rld. Co. v. Wilhelm, 33 Kas. 206.....	724
Austin v. Jones, 37 Kas. 327.....	566
A. & N. Rld. Co. v. Flinn, 24 Kas. 627.....	111
Back v. Carpenter, 29 Kas. 349.....	253
Bailey v. Bayne, 20 Kas. 657.....	611, 742
Bailey v. Manufacturing Co., 32 Kas. 73.....	597
Barker v. Comm'rs of Wyandotte Co., 45 Kas. 681.....	702
Bebb v. Crowe, 39 Kas. 342.....	614
Becker v. Mason, 30 Kas. 701.....	385
Bequillard v. Bartlett, 19 Kas. 382.....	256
Berroth v. McElvain, 41 Kas. 269.....	269, 270
Bogle v. Gordon, 39 Kas. 31.....	177
Bowman v. Cockrill, 6 Kas. 311.....	93, 95
Bridge Co. v. Comm'rs of Wyandotte Co., 10 Kas. 326.....	288
Brown v. Railroad Co., 31 Kas. 1.....	256
Burhans v. Hutcheson, 25 Kas. 625.....	80
Bush v. Collins, 35 Kas. 535.....	308
Cameron v. Marvin, 26 Kas. 612.....	85
Carney v. Havens, 23 Kas. 82.....	98
Carson v. Funk, 27 Kas. 524.....	447
Carver v. Shelly, 17 Kas. 474.....	270, 369
Case v. Ingersoll, 7 Kas. 367.....	597
Case v. Steele, 34 Kas. 90.....	395
C. B. U. P. Rld. Co. v. Andrews, 34 Kas. 563.....	35
C. B. U. P. Rld. Co. v. Henigh, 23 Kas. 347.....	111, 115
Challiss v. City of Atchison, 39 Kas. 276.....	289
Chick v. Willette, 2 Kas. 379.....	360
Christie v. Barnes, 33 Kas. 317.....	256

## CASES AFFIRMED—CONTINUED:

City of Atchison v. Byrnes, 22 Kas. 68.....	674
City of Ellsworth v. Rossiter, 46 Kas. 287.....	106, 378
City of Eureka v. Davis, 21 Kas. 580.....	95
City of Kingman v. Berry, 40 Kas. 625.....	138
City of Ottawa v. Rohrbough, 42 Kas. 253.....	701
City of Wichita v. Burleigh, 36 Kas. 42.....	95
C. K. & W. Rld. Co. v. Ozark Township, 46 Kas. 415.....	767
Clark v. Reyburn, 1 Kas. 281.....	360
Clark v. Spencer, 14 Kas. 398.....	569
Claypoole v. Houston, 12 Kas. 324.....	177
Clough v. Hart, 8 Kas. 487.....	200
Cohen v. Trowbridge, 6 Kas. 393.....	270, 369
Comm'rs of Anderson Co. v. P. F. & R. Rly. Co., 20 Kas. 534.....	105
Comm'rs of Cherokee Co. v. The State, 36 Kas. 337.....	95
Comm'rs of Lyon Co. v. Coman, 43 Kas. 676.....	246
Comm'rs of Marion Co. v. Comm'rs Harvey Co., 26 Kas. 181.....	93, 95
Comm'rs of Marion Co. v. Welch, 40 Kas. 767.....	767
Comm'rs of Wabaunsee Co. v. Muhlenbacher, 18 Kas. 129.....	702
Cooper v. Clark, 44 Kas. 358.....	597
Corbin v. Kincaid, 33 Kas. 649.....	85
Coulson v. Wing, 42 Kas. 507.....	247
County Seat of Linn Co., 15 Kas. 530.....	49
Crawford v. K. C. Ft. S. & G. Rld. Co., 45 Kas. 474.....	450
Cuendet v. Lahmer, 16 Kas. 527.....	597
Curtis v. Buckley, 14 Kas. 456.....	360
Davidson v. Sechrist, 28 Kas. 324.....	743
Dayton v. Savings Bank, 23 Kas. 422.....	85
Deford v. Hutchison, 45 Kas. 318.....	663
Dickson v. Randal, 19 Kas. 212.....	270
Dobbs v. Stauffer, 24 Kas. 127.....	373
Dolan v. Van DeMark, 35 Kas. 304.....	85
Doolittle v. Ferry, 20 Kas. 234.....	655
Dougherty v. Porter, 18 Kas. 206.....	31, 63
Doyle v. Doyle, 33 Kas. 721.....	326
Dreilling v. National Bank, 43 Kas. 197.....	569
Duigenan v. Claus, 46 Kas. 275.....	450
Earlywine v. T. S. & W. Rld. Co., 43 Kas. 746.....	72
Eaves v. Estes, 10 Kas. 314.....	445
Eddy v. Weaver, 37 Kas. 540.....	16, 678
Edwards v. Fry, 9 Kas. 417.....	689
Fair Association v. Myers, 44 Kas. 132.....	183
Farlin v. Sook, 26 Kas. 397.....	590
Foote v. Sprague, 13 Kas. 155.....	130
Franklin v. Colley, 10 Kas. 260.....	689
Frey v. Aultman, 30 Kas. 182.....	327
Friend v. Green, 43 Kas. 167.....	291, 370
Ft. S. W. & W. Rly. Co. v. Karracker, 46 Kas. 511.....	637, 641
Furniture Co. v. Armstrong, 46 Kas. 270.....	597
Gas Co. v. Schliefer, 22 Kas. 470.....	611
George v. Hatton, 2 Kas. 333.....	291
Gillespie v. Thomas, 23 Kas. 138.....	177
Goggin v. Railway Co., 12 Kas. 416.....	755
Grandstaff v. Brown, 23 Kas. 178.....	611
Green v. Barnard, 18 Kas. 518.....	412
Green v. McMurtry, 20 Kas. 189.....	589
Haas v. Lees, 18 Kas. 454.....	270
Hall v. Jenness, 6 Kas. 365.....	370, 381



## CASES AFFIRMED—CONTINUED:

Halsey v. Van Vliet, 27 Kas. 474.....	589
Hanson v. Wolcott, 19 Kas. 207.....	515
Harris v. Cappell, 28 Kas. 117.....	597
Harris v. Claffin, 36 Kas. 543.....	177, 313
Harvey v. Comm'rs of Rush Co., 38 Kas. 159.....	278
Hartun v. Sizer, 23 Kas. 310.....	395
Heatwole v. Gorrell, 35 Kas. 392.....	190
Hefferlin v. Stuckslager, 6 Kas. 166.....	270
Hentig v. Redden, 46 Kas. 231.....	767
Hershfield v. Lowenthal, 35 Kas. 407.....	597
Hodgin v. Barton, 23 Kas. 740.....	619
Hogan v. Manners, 23 Kas. 551.....	614
Hoggett v. Emerson, 8 Kas. 262.....	327
Hoisington v. Brakey, 31 Kas. 560.....	767
Hollenbeck v. Ess, 31 Kas. 87.....	69
Hosea v. McClure, 42 Kas. 403.....	597
Hover v. Tenney, 27 Kas. 133.....	353
Hudson v. Comm'rs of Atchison Co., 12 Kas. 140.....	373
Hummer v. Lamphear, 32 Kas. 475.....	611
Implement Co. v. Schultz, 45 Kas. 52.....	558
Ingels v. Sutliff, 36 Kas. 444.....	579
<i>In re</i> Cameron, 44 Kas. 64.....	57
<i>In re</i> Dill, 32 Kas. 668.....	281
<i>In re</i> Ebenhack, 17 Kas. 618.....	769, 770
<i>In re</i> Hinkle, 31 Kas. 712.....	278
<i>In re</i> Petty, 22 Kas. 477.....	281
<i>In re</i> Tillery, 43 Kas. 188, 191.....	273
<i>In re</i> Wheeler, 34 Kas. 96.....	774
Insurance Co. v. Hogue, 41 Kas. 524.....	673
Insurance Co. v. McLanathan, 11 Kas. 538.....	5
Intoxicating Liquor Cases, 25 Kas. 751.....	142, 205, 419
Jeffers v. Forbes, 28 Kas. 174.....	373, 374
K. C. Rly. Co. v. Fitzsimmons, 22 Kas. 686.....	111
K. C. Ft. S. & G. Rld. Co. v. Ewing, 23 Kas. 273.....	276
K. C. Ft. S. & G. Rld. Co. v. Owen, 25 Kas. 419.....	521
K. C. & E. Rld. Co. v. Kregelo, 32 Kas. 608.....	195
K. C. & T. Rly. Co. v. Vickroy, 46 Kas. 248.....	707
Kelsey v. Harrison, 29 Kas. 143.....	597
Kennett v. Fickel, 41 Kas. 211.....	742
Kiff v. Railroad Co., 32 Kas. 263.....	756
Koons v. Rittenhause, 28 Kas. 359.....	590
K. P. Rly. Co. v. Brady, 17 Kas. 380, 384.....	111
K. P. Rly. Co. v. Butts, 7 Kas. 308.....	520
K. P. Rly. Co. v. Comm'rs Wyandotte Co., 16 Kas. 587, 596.....	715, 725
K. P. Rly. Co. v. Wood, 24 Kas. 619.....	276
Kuhn v. Freeman, 15 Kas. 423.....	361
Kurtz v. Sponable, 6 Kas. 395.....	190
Leitzbach v. Jackman, 28 Kas. 524.....	70
Leser v. Glaser, 32 Kas. 546.....	557
Lewis v. Kirk, 28 Kas. 497.....	80
List v. Jockheck, 45 Kas. 349.....	515
Lyons v. Bodenhamer, 7 Kas. 472.....	674
L. & W. Rld. Co. v. Ross, 40 Kas. 598.....	193
Macomber v. Scott, 10 Kas. 335.....	245
Main v. Payne, 17 Kas. 608.....	326
Martin v. Francis, 18 Kas. 220.....	121, 123, 563
Mason v. Spencer, 35 Kas. 512.....	49

## CASES AFFIRMED—CONTINUED:

Mastin v. Gray, 19 Kas. 458.....	603
Mawhinney v. Doane, 40 Kas. 681.....	589
McGrath v. City of Newton, 29 Kas. 365.....	378
McKee v. Eaton, 26 Kas. 226.....	378
McPike v. Atwell, 34 Kas. 142.....	597
Mendenhall v. Burton, 42 Kas. 570.....	253
Mickel v. Hicks, 19 Kas. 578.....	64
Mincer v. School District, 27 Kas. 253.....	105
Mo. Pac. Rly. Co. v. Cady, 44 Kas. 633.....	520
Mo. Pac. Rly. Co. v. Cassity, 44 Kas. 207.....	309
Mo. Pac. Rly. Co. v. Harrelson, 44 Kas. 252.....	350
Mo. Pac. Rly. Co. v. Merrill, 40 Kas. 404.....	269, 520, 687, 641
Mo. Pac. Rly. Co. v. Reid, 34 Kas. 410.....	395
Morrill v. Douglass, 14 Kas. 294.....	201
Morris v. Ward, 5 Kas. 239.....	613
Morrissey v. Donohue, 32 Kas. 644.....	614
Myers v. Kothman, 29 Kas. 19.....	589
National Bank v. Croco, 46 Kas. 629.....	454
Neitzel v. Hunter, 19 Kas. 221.....	63
Nesbit v. Hines, 17 Kas. 317.....	674
Newby v. Myers, 44 Kas. 477.....	16
Newkirk v. Marshall, 35 Kas. 77.....	689
Nichols v. Overacker, 16 Kas. 54.....	412
Noffziger v. McAllister, 12 Kas. 315.....	702
Northrop v. Cooper, 23 Kas. 432.....	63
Ogden v. Walters, 12 Kas. 282.....	177
Oliphant v. Comm'rs of Atchison Co., 18 Kas. 386.....	702
O'Neill v. Douthitt, 40 Kas. 689.....	79, 81, 760
Organ Co. v. Lasley, 40 Kas. 521.....	611
Palmer v. Waddell, 26 Kas. 352.....	373
Perkins v. Matteson, 40 Kas. 165.....	80
Philpin v. McCarty, 24 Kas. 402.....	95
Pierce v. Butters, 21 Kas. 124.....	177
Pilcher v. A. T. & S. F. Rld. Co., 38 Kas. 516.....	696
Porter v. Wells, 6 Kas. 453.....	569
Pritchett v. Mitchell, 17 Kas. 358.....	360
P. & F. R. Rly. Co. v. Comm'rs of Anderson Co., 16 Kas. 302.....	105
Quigley v. Comm'rs of Sumner Co., 24 Kas. 293.....	284, 286
Railroad Co. v. Andrews, 34 Kas. 563.....	589
Railroad Co. v. Caldwell, 8 Kas. 244.....	611
Railroad Co. v. Dwelle, 44 Kas. 509.....	573
Railroad Co. v. Grimes, 38 Kas. 241.....	16
Railroad Co. v. Grove, 39 Kas. 781.....	5
Railroad Co. v. Irwin, 35 Kas. 286.....	5, 465
Railroad Co. v. Kuhn, 38 Kas. 104.....	573
Railroad Co. v. Lindley, 42 Kas. 714.....	432
Railroad Co. v. Orr, 8 Kas. 419.....	193
Railroad Co. v. Ritz, 33 Kas. 404.....	401
Railroad Co. v. Roach, 35 Kas. 743.....	756
Railroad Co. v. Ryan, 11 Kas. 609.....	27
Railroad Co. v. Weber, 33 Kas. 543.....	471
Railroad Co. v. Wilder, 17 Kas. 246.....	361, 616
Railway Co. v. Brown, 26 Kas. 443.....	472
Railway Co. v. Curl, 28 Kas. 622.....	276
Railway Co. v. Splitlog, 45 Kas. 68.....	707
Railway Co. v. Young, 8 Kas. 658.....	465
Randal v. Elder, 12 Kas. 257.....	582, 695

## CASES AFFIRMED—CONTINUED:

Rasure v. Hart, 18 Kas. 340.....	228
Reed v. Umbarger, 11 Kas. 206, 207.....	228, 412
Ritchie v. Mulvane, 39 Kas. 241.....	253
Robbins v. Sackett, 23 Kas. 304.....	360
Robinson v. Wilson, 15 Kas. 595.....	228
Rogers v. Hodgson, 46 Kas. 276.....	256, 354
Rowe v. Palmer, 29 Kas. 337.....	177
Rush v. Gordon, 38 Kas. 535.....	614
Rush v. Mo. Pac. Rly. Co., 36 Kas. 129.....	322
Ryan v. Madden, 46 Kas. 245.....	15
Sarbach v. Newell, 28 Kas. 642.....	336
School District v. The State, 29 Kas. 57.....	253
Schultz v. Clock Co., 39 Kas. 334.....	63
Seckler v. Delfs, 25 Kas. 165.....	360
Shahan v. Smith, 38 Kas. 474.....	370
Shaw v. Stewart, 43 Kas. 572.....	675
Shepard v. Stockham, 45 Kas. 244.....	659, 767
Sherry v. Sampson, 11 Kas. 612.....	70
Shields v. Miller, 9 Kas. 390.....	313
Shoemaker v. Brown, 10 Kas. 383.....	281
Shumaker v. Sibert, 18 Kas. 104.....	387
Shuster v. Finan, 19 Kas. 116.....	270
Simpson v. Boring, 16 Kas. 248.....	69
Simpson v. Rice, 43 Kas. 22.....	291
Simpson v. Voss, 31 Kas. 227.....	669
S. K. Rly. Co. v. Gould, 44 Kas. 68.....	711
Smalley v. Yates, 36 Kas. 519.....	306
Smith v. Town Co., 36 Kas. 758.....	616
Sponenbarger v. Lemert, 23 Kas. 55.....	395
Sprague v. Railway Co., 34 Kas. 347.....	755
Spratley v. Insurance Co., 5 Kas. 155.....	104
Sproul v. National Bank, 22 Kas. 336.....	227
Stanley v. Farmers' Bank, 12 Kas. 592.....	269
Stewart v. Comm'rs of Wyandotte Co., 45 Kas. 708.....	700
St. J. & D. O. Rld. Co. v. Chase, 11 Kas. 47.....	521
St. L. & S. F. Rly. Co. v. Fudge, 39 Kas. 543.....	635
St. L. & S. F. Rly. Co. v. Shoemaker, 27 Kas. 677.....	180
Struthers v. Fuller, 45 Kas. 735.....	447, 450
Sullivan v. School District, 39 Kas. 347.....	105
Sutphen v. Sutphen, 30 Kas. 510.....	98
Swenson v. Plow Co., 14 Kas. 387.....	373
Swiggett v. Dodson, 38 Kas. 702.....	494
Taylor v. Clendening, 4 Kas. 525.....	156
Taylor v. Stone Co., 38 Kas. 547.....	295
Tefft v. Citizens' Bank, 36 Kas. 457.....	689
Thacher v. Comm'rs of Jefferson Co., 13 Kas. 182.....	106
The State v. Barrett, 27 Kas. 213.....	95
The State v. Bjorkland, 34 Kas. 377.....	730
The State v. Blackman, 32 Kas. 615.....	729
The State v. Brooks, 33 Kas. 708.....	260
The State v. Butts, 31 Kas. 537.....	204
The State v. Chandler, 31 Kas. 201.....	243
The State v. Douglass, 44 Kas. 618.....	168
The State v. Eggleston, 34 Kas. 719.....	63
The State v. Fisher, 37 Kas. 404.....	243
The State v. Goodwin, 33 Kas. 538.....	243
The State v. Hart, 33 Kas. 218.....	162

## CASES AFFIRMED—CONTINUED:

The State v. Henry, 24 Kas. 457.....	189
The State v. Henthorn, 46 Kas. 613.....	264, 738, 771
The State v. Hescher, 46 Kas. 534.....	260
The State v. Hodges, 45 Kas. 390.....	243
The State v. Iseman, 34 Kas. 377.....	730
The State v. Knowles, 34 Kas. 393.....	188
The State v. Longton, 35 Kas. 375.....	730, 731
The State v. McNulty, 26 Kas. 533.....	139
The State v. Mo. Pac. Rly. Co., 33 Kas. 176.....	306
The State v. Potter, 15 Kas. 304.....	142
The State v. Ratner, 44 Kas. 429.....	138
The State v. Reno, 41 Kas. 674.....	293
The State v. Schaefer, 44 Kas. 90.....	142
The State v. Skinner, 34 Kas. 265.....	260
The State v. Smith, 38 Kas. 194.....	139
The State v. Spendlove, 44 Kas. 1.....	161
The State v. Tilney, 38 Kas. 714.....	189
The State v. Vincent, 46 Kas. 618.....	738
The State v. Volmer, 6 Kas. 371.....	142
The State v. White, 44 Kas. 514.....	510
The State, <i>ex rel.</i> , v. Sanders, 41 Kas. 228.....	98
The State, <i>ex rel.</i> , v. Stock, 38 Kas. 154.....	46
Thomas v. Reynolds, 29 Kas. 304.....	247
Thompson v. McEwen, 24 Kas. 757.....	620
Thompson v. Williams, 30 Kas. 114.....	339
Tibbetts v. Deck, 41 Kas. 492.....	589
Tomlinson v. Thompson, 27 Kas. 72.....	360
Tootle v. Coldwell, 30 Kas. 125.....	597
Town Co. v. Maris, 11 Kas. 147.....	373
Town Co. v. Russell, 46 Kas. 382.....	626
Troy v. Comm'rs of Doniphan Co., 32 Kas. 507.....	289
Tucker v. Allen, 16 Kas. 312.....	212
U. P. Rly. Co. v. Fray, 43 Kas. 750.....	401
U. P. Rly. Co. v. Rollins, 5 Kas. 187.....	519
Vanderslice v. Knapp, 20 Kas. 647.....	360
Voss v. School District, 18 Kas. 467.....	253
Waffle v. Short, 25 Kas. 503.....	99
Wagstaff v. Challiss, 31 Kas. 212.....	269, 270
Walburn v. Chenault, 43 Kas. 352.....	381
Warner v. Bucher, 24 Kas. 478.....	63
Weaver v. Gardner, 14 Kas. 347.....	291
West v. Rice, 4 Kas. 563.....	73
Whetstone v. Ottawa University, 13 Kas. 320.....	626
Whitaker v. Hawley, 30 Kas. 327.....	767
White v. Mo. Pac. Rly. Co., 31 Kas. 280.....	519
Willite v. Williams, 41 Kas. 288.....	743
Williams v. Moorehead, 33 Kas. 609.....	569
Wilson v. James, 29 Kas. 249.....	406
Woodman v. Davis, 32 Kas. 344.....	247
Woodruff v. Baldwin, 23 Kas. 494.....	93, 95
Wolf v. Hahn, 28 Kas. 588.....	395
Wolf v. Washer, 32 Kas. 533.....	256, 354
Wolfey v. Rising, 12 Kas. 535.....	370
W. & W. Rld. Co. v. Beebe, 39 Kas. 465.....	767
Yandle v. Crane, 13 Kas. 344.....	611, 742
Young v. Ledrick, 14 Kas. 92.....	419
Young v. Whittenhall, 15 Kas. 579.....	326

## CASES DISTINGUISHED:

Babcock v. Farmers' Bank, 46 Kas. 548.....	742
Bailey v. Manufacturing Co., 32 Kas. 73.....	426, 428
Bank of Leoti v. Fisher, 45 Kas. 726 .....	745
Bemis v. Becker, 1 Kas. 217.....	164
Cohen v. Trowbridge, 6 Kas. 385 .....	62
Deford v. Nye, 40 Kas. 665 .....	428
Dewey v. Linscott, 20 Kas. 686 .....	16
Garvin v. Jennerson, 20 Kas. 371.....	63
Goggin v. K. P. Rly. Co., 12 Kas. 416 .....	10
Higginbotham v. Thomas, 9 Kas. 328 .....	61
Kennedy v. Beck, 15 Kas. 555 .....	190
Lewis v. Linscott, 37 Kas. 386.....	16
McPike v. Atwell, 34 Kas. 142.....	428
National Bank v. Comm'rs of Barber Co., 43 Kas. 648 .....	286
Randall v. Shaw, 28 Kas. 419 .....	427, 428
Ravenscraft v. Pratt, 22 Kas. 20.....	436
Sanford v. Weeks, 39 Kas. 649.....	358, 359
Scott v. Morning, 18 Kas. 459 .....	742
Sprague v. Mo. Pac. Rly. Co., 34 Kas. 352 .....	10
The State v. Brooks, 33 Kas. 708 .....	293
The State v. Griffith, 45 Kas. 142 .....	138
Tootle v. Coldwell, 30 Kas. 125 .....	427, 428
U. P. Rly. Co. v. Estes, 37 Kas. 229 .....	358, 359
Watts v. Cook, 24 Kas. 278 .....	64

CATTLE-GUARDS—SEE "RAILROADS, AND RAILROAD COMPANIES," 19.

## CHATTEL MORTGAGE:

1. *Lien—Priority.* Where a mortgagee obtains possession of the mortgaged chattels before any lien or other right attaches, his title under the mortgage is good against everybody, if it was previously valid between the original parties to the mortgage. The purchaser of a note secured by a subsequent mortgage upon the same property, taken by the mortgagee with notice of the prior mortgage, is bound to take notice of the possession of the first mortgagee, acquired previous to such purchase. *Gagnon v. Brown*..... 83
2. *Assignment for Benefit of Creditors—Preferences.* A debtor in failing circumstances, engaged in making a general assignment of his property for the benefit of all his creditors, cannot at the same time make valid preferences of certain of his creditors, by chattel mortgages or otherwise. *Hardware Co. v. Implement Co.*..... 423
3. *Certain Creditors not Entitled to Preference.* Where an insolvent debtor commences the preparation of chattel mortgages to prefer certain creditors, but while writing such chattel mortgages, and before the execution of the same, determines to make a general assignment of all his property for the benefit of his creditors and selects his assignee therefor, and then proceeds to execute his chattel mortgages to prefer certain creditors, and at once completes his deed of assignment in accordance with his previous resolution, the making of the chattel mortgages and the execution of the deed of assignment will all be treated as a simultaneous or continuous act, and the creditors named in the chattel mortgages will not be entitled to any preference. The case of *Bailey v. Manufacturing Co.*, 32 Kas. 73, referred to and commented on. *Id.*..... 423

CHATTEL MORTGAGE—CONTINUED:

4. *Fraudulent Conveyance — Attachment — Sufficient Grounds.* Where an insolvent debtor, being pressed by his creditors, executes a chattel mortgage upon his personal property to pay or secure for his attorney \$500, most of which is in consideration of future legal services, such mortgage is an unlawful withdrawal of that which justly belongs to the *bona fide* creditors of the insolvent debtor, and operates to delay and defraud his creditors in the collection of their debts. The execution and delivery of such a mortgage furnish sufficient ground for the issuance of an attachment against him. *Shellabarger v. Mottin*, 451
5. *Attachment by Chattel Mortgagee.* A creditor holding a chattel mortgage, as security for his debt, upon property belonging to the debtor, can maintain an attachment against the same and other property of the debtor. *State Bank v. Mottin*..... 455
6. *Partial Discharge.* But if such a chattel mortgage is ample security to pay the creditor's claim in full, together with the interest and costs, the district court, or judge thereof, may, upon proper application therefor, discharge so much of the property not included in the chattel mortgage as is not necessary to satisfy the claim of the creditor. *Id.*..... 455
7. *Mortgagee, Deeming Himself Insecure.* Where a chattel mortgage is given to secure a debt, and the mortgagor is to retain the possession of the property until default shall be made in the payment of the debt or until the mortgagee shall deem himself insecure, the mortgagee may afterward take the possession of the mortgaged property whenever default shall be made in the payment of the mortgage debt, or when the mortgagee shall deem himself insecure. *Jones v. Annis*..... 478
8. *Replevin—Cattle, not Covered by Mortgage.* And when the mortgagee takes the possession of the mortgaged property for the above reasons, which property consists of 10 head of cattle, and through a mistake takes two head of cattle not covered by the mortgage instead of two of the mortgaged cattle, and the mortgagor replevies the cattle, *held*, that the mortgagor can maintain the action only for the two cattle not covered by the mortgage. *Id.*..... 478, 479
9. *Measure of Recovery.* Where the mortgagee while in the possession of the cattle disposes of two head thereof, *held*, that the plaintiff in the replevin action cannot recover a judgment absolutely for the value of these two head of cattle as damages, but he is entitled only to have their price or value deducted from the amount of the mortgage debt still remaining due and unpaid. *Id.*..... 479
10. *Trover and Conversion — Recovery — Evidence.* In an action against a sheriff by a chattel mortgagee, the lien of whose mortgage is subordinate to a first mortgage and the levy of three several orders of attachment, to recover the amount of his mortgage because of the conversion of the property, it is necessary that a wrongful taking, or a taking made wrongful by subsequent conduct, or a conversion, be established by the evidence. *Boot and Shoe Co. v. Ware*..... 483
11. *Liens—Priority.* Three several orders of attachment levied on a stock of merchandise on the 30th day of October create a lien prior to and superior to that of a chattel mortgage filed in the

## CHATTEL MORTGAGE—CONTINUED:

- office of the register of deeds on the 1st day of November of the same year. *Id.* ..... 483
12. *Sheriff—Conversion—Responsibility.* A sheriff, being in the actual possession of a stock of goods by virtue of a levy made in pursuance to three several writs of attachment in his hands, is not responsible to a subsequent chattel mortgagee for conversion, when a receiver duly appointed by the court from which the orders of attachment issued takes exclusive control and possession of the same, and sells and receives the proceeds. *Id.* ..... 483
13. *When Fraudulent—Retention of Property by Mortgagor.* When, by the terms of two chattel mortgages, no power of sale is given to the mortgagor of certain live stock, but the mortgagor, with the knowledge and acquiescence of the mortgagees, makes sales of portions of the live stock, and buys other live stock and mingles it with the mortgaged stock, makes weekly shipments, and buys and sells and adds to and takes from the live stock originally mortgaged, until, after the lapse of a few months, the identity of the particular live stock mortgaged is lost, and the mortgagor cannot identify it; and the mortgagor uses, controls, buys, and sells, and in all other respects treats the live stock as his own, and as if no mortgage existed, and applies the proceeds of the sales made at his own discretion, and does not render an account to the mortgagees of the amount or disposition of the proceeds of stated sales, such mortgages are, as a matter of law, fraudulent and void as to other creditors of the mortgagor. *Brown v. Barber.* ..... 527
14. *Promissory Note—Rights of Surety—Lien.* The surety on a promissory note given for the purchase of personal property, to whom the property was delivered by the maker, has a right to retain the possession of said property against a chattel mortgagee, to whom the maker of said note executed a chattel mortgage while in temporary possession of the property by permission of the pledgee. *Clare v. Agerter.* ..... 604
- See "EVIDENCE," 6.

## CITIES:

1. *Contract—Against Public Policy.* Where the general public has an interest in the location of a public office, like that of a post office in a city, a contract to induce the retention of the post office at a given point, thereby restricting its location in the city to one place only, for individual benefit or personal gain, is against public policy, and not enforceable. *Woodman v. Innes.* ..... 26
2. *Child, Injured—Company not Liable for Damages.* Where a railroad company stops its train not to exceed a minute, as it approaches a railroad crossing within the limits of an incorporated city, and while its cars are standing over a street crossing a child seven years of age, on his way home from school, attempts to take hold of the brake ladder on a freight car in the train, for the purpose of climbing over the car, and the train starts just as he makes the effort to get onto the car, and jerks him off, so that he falls under the wheels and is run over and injured, and the train-men have no knowledge of the attempt upon the part of the boy to board the train, *held*, that the company is not guilty of such negligence toward the boy

CITIES—CONTINUED:

- as to render it liable for damages on account of such injury. *A. T. & S. F. Rld. Co. v. Plaskett*..... 107
3. *Accident at Railroad Crossing—Company, not Negligent.* As it approached the crossing of another railroad in a city of 5,000 inhabitants, a freight train stopped not to exceed a minute, so as to block one of the principal streets of the city near a public-school building. A boy seven years old tried to climb over the cars. He was not seen by the train-men. The train started, and he was thrown off and injured. The jury found that the company was negligent, in that the train men knew that the crossing was frequented by children, and were not on the lookout. *Held*, That there was no evidence of negligence on the part of the company. *Id*..... 112
4. *Voters—Registration—Compliance with Law.* A slight departure from some directory provision of the act relating to the registration of voters in cities, without any fraudulent intent on the part of the officer, and which in its nature and effect cannot injure anyone or operate to interfere with or defeat the purpose of the act, is not punishable as a felony, or within the penalty described in § 15 of the act. *The State v. Bush*.... 201
5. *Sectarian Colleges—Void Tax.* There is no power in the officers of a city to subscribe public money in aid of private, sectarian colleges, and a tax levied on property within the city for that purpose is void. *A. T. & S. F. Rld. Co. v. City of Atchison*..... 712
6. *Illegal Tax—Involuntary Payment—Recovery.* *K. P. Rty. Co. v. Comm'rs of Wyandotte Co.*, 16 Kas. 587, and *A. T. & S. F. Rld. Co. v. Comm'rs of Atchison Co.*, *infra*, followed, holding that a portion of the illegal tax was paid by plaintiff under such circumstances as to be an involuntary payment, which may be recovered back. *Id*..... 712
7. *Disorderly Conduct—Complaint.* A complaint charging that H., on the 6th day of July, 1889, at the city of Topeka, county of Shawnee and state of Kansas, unlawfully and willfully disturbed the peace and quiet of the city of Topeka, by the use of loud, profane and indecent language, states an offense under § 22 of ordinance 861 of said city. The evidence examined, and *held* sufficient to support a finding by the jury that the peace of the city was disturbed by the defendant as alleged. *City of Topeka v. Heitman*..... 739
8. *Instructions—Exception, General and Indefinite.* The exception to the last instruction given by the court to the jury is too general and indefinite to save any objection to the instruction, except the usual one that it does not correctly state the law of the case. It is not sufficiently specific and certain to save the question whether or not the giving of the instruction after the jury had partially considered the case is error. *Id*..... 739

CIVIL CODE, CONSTRUED:

- § 10—form of action..... 379
- § 16, subdiv. 2—certain actions to be brought within five years, 60
- § 16, subdiv. 4—action within 15 years..... 60
- § 17—legal disability to bring action..... 60
- § 18, subdiv. 8—certain actions to be brought within two years, 326
- § 21—limitation of action—absconding..... 326, 327



## CIVIL CODE CONSTRUED—CONTINUED:

35—joinder of plaintiffs.....	374
37—parties plaintiff or defendant.....	374
59—summons—præcipe.....	291
72, 73—notice by publication—affidavit.....	313
74—publication—paper.....	315
83—joinder of actions.....	374, 380
89—demurrer by defendant.....	373, 374
91—waiver by defendant.....	377, 380
92—misjoinder—new petition.....	375, 380
139—amendment at any time.....	611, 750
165—liability of sheriff, how fixed.....	35
167—liability—bail.....	35
176, 177—replevin—delivery.....	189
184, 185—replevin—trial—judgment.....	371
275—trial—order of procedure.....	433
306—new trial—causes.....	315
308—application for new trial—time.....	752
310—petition for new trial.....	314, 315
396—judgment—parties.....	379
523—offer to compromise—costs.....	574
528—offer to confess judgment.....	574
534—notice of motion.....	763
542a—jurisdiction of supreme court.....	30, 33
551, 552—stay—judgment—undertaking.....	35
556—limitation—reversing—vacating judgment.....	449
575—vacating judgment—limitation—time.....	515
601, 602—pay for improvements—tax title.....	70
629—power of court.....	336
724—qualifications of surety.....	616

## CRIMINAL CODE, CONSTRUED:

69—information, when filed.....	510
72—amendment of information.....	162
236—charge to jury, to be in writing.....	142
326—costs—payment by prosecutor.....	769, 770

## COAL DUST:

1. *Explosive Element—Judicial Notice.* In an action to recover for injuries resulting from a colliery explosion, the court will not take judicial notice that dry, fine coal dust is a dangerous and explosive element in a coal mine. *Coal Co. v. Wilson*..... 460
2. *Negligence—Incompetent Evidence.* Where the negligence alleged was that the defendant company permitted the accumulation of inflammable, combustible and explosive coal dust in the mine, and failed to remove or sprinkle the same, proof that the mine was improperly laid out and constructed, or that proper doors or brattices were not supplied, is incompetent and inadmissible. *Id.*..... 460

COLLATERAL ATTACK—SEE “JUSTICES, AND JUSTICES’ COURTS,”  
9; “PLEADING AND PRACTICE,” 11, 12, 13, 21.

## COLLEGE:

*Agreement, Construed—Building of College, not Ultra Vires.* The instrument sued on in this case construed, in the light of the whole record, to import an undertaking between the plaintiff

COLLEGE—CONTINUED:

and defendant. Also *held*, that, under the decisions of this court, the building of the college referred to in this case was not *ultra vires*. *Fulton v. Land Co.*..... 621

COMPARISON OF SIGNATURES—SEE "CRIMINAL LAW," 17.

COMPENSATION—SEE "STATE AGENT."

COMPLAINING WITNESS—SEE "CRIMINAL LAW," 27.

COMPUTATION OF TIME—SEE "STATUTE," 1.

CONCEALMENT—SEE "FRAUD," 4, 5.

CONNECTING LINES—SEE "RAILROADS, AND RAILROAD COMPANIES," 28, 29.

CONSIDERATION—SEE "PROMISSORY NOTE," 2.

CONSTITUTION OF KANSAS, CITED:

Bill of rights, § 10—no person shall be a witness against himself.....	737
Art. 2, § 3—general law—in force when published.....	159
Art. 2, § 16—bill—only one subject in title.....	90, 94, 95
Art. 2, § 20—enacting clause of all laws.....	158, 159
Art. 2, § 21—county tribunals—local legislation.....	285
Art. 2, § 24—state treasury—drawing money—appropriation.....	120, 122, 123, 124
Art. 3, § 8—probate court—jurisdiction.....	65, 419
Art. 6, § 3—proceeds of school lands.....	563
Art. 9, § 1—new counties—organization.....	48, 49, 253
Art. 12, § 4—corporation—right-of-way—compensation.....	193
Art. 15, § 9—homestead exemption.....	411, 582

CONSTITUTIONAL LAW:

1. *Valid Statute.* The act entitled "An act to legalize a certain election in Cheyenne county, and to declare the town of St. Francis the permanent county-seat of said county," approved February 5, 1891, is constitutional and valid. *The State, ex rel., v. Burton*..... 44
2. *Anti-Trust Law—Valid Statute.* The provisions of the "anti-trust law," being chapter 257 of the Laws of 1889, so far as they relate to the business of insurance, are covered by the title of the act, and are therefore valid. *In re Pinkney, Petitioner*.... 89
3. *Laws—Enactment.* All laws shall be enacted by bill. (Const., art. 2, § 20.) *In re Swartz, Petitioner*..... 157
4. *Publication.* Laws of a general nature are not in force until after publication thereof. (Const., art. 2, § 9.) *Id.*..... 157
5. *Costs in Criminal Cases—Liability of Complainng Witness—Constitutional Law.* Section 326 of the criminal code, which provides that a prosecuting witness may be committed for his failure to pay costs when the jury find the defendant not guilty, and also find that the prosecution was instituted from malicious motives and without probable cause, is not unconstitutional. (*In re Ebenhack*, 17 Kas. 618, followed.) *In re Lowe, Appellant*..... 769

CONSTRUCTION OF DEED—SEE "CONVEYANCE," 4.

CONSTRUCTIVE CONTEMPT—SEE "PRACTICE, DISTRICT COURT," 6.

# CONTEMPT OF COURT:

*Summary Punishment.* When the contempt sought to be punished is committed *in facie curiæ*, the punishment is summary, and generally immediately follows its commission. (*The State v. Henthorn*, 46 Kas. 618.) *In re Noonan, Petitioner*..... 771  
See "CRIMINAL LAW," 24, 28.

CONTINUANCE—SEE "ERROR," 9; "JUSTICES, AND JUSTICES' COURTS," 1.

# CONTRACT:

1. *Carrier—Injuries to Stock—Notice of Claim.* A contract between a railroad company and a shipper of stock stipulated that, as a condition precedent to his right to recover damages for any loss or injury to such stock, he should give notice in writing to some officer of the railroad company, or its nearest station agent, before the removal of such stock from the place of delivery. In an action to recover damages for injuries to such stock while *en route*, where the condition of the stock was made known to the station agent of the railroad company at the place of destination, and such agent consented to the removal of the stock from the car, and had an opportunity to examine and inspect the animals after such removal and before they had mingled with other stock or been removed from the place of destination, and a written notice for damages was transmitted to the claim agent of the railroad company within four days after the removal of the stock from the car; and 10 days thereafter, upon the death of one of the animals, a subsequent notice for damages was given to the railroad company: *Held*, That there had been a substantial compliance with the contract, upon the part of the shipper. *A. T. & S. F. Rld. Co. v. Temple*..... 7
2. *Warranty—Breach—Damages.* In an action for damages for a breach of warranty concerning the quality of certain paint, probable or future damages, which are not certain, fixed, or liquidated, cannot be allowed. *Paint Co. v. Glover*..... 15
3. *Nominal Damages.* If there is a breach of warranty in the sale of personal property on the part of the seller, the right of nominal damages exists at once in favor of the purchaser. *Id.*.... 15
4. *Elements of Damages.* If a breach of warranty on the part of the seller in the sale of paint, or any similar article of use, has involved the purchaser in a legal liability to pay money, or to incur expense to other parties for whom he did work with the paint or other article, to relieve himself against the effects of the bad quality of the paint or other article, such liability or expense, if certain, fixed, or liquidated, whether paid or not, constitutes an element of damages for which the defendant is entitled to recover. *Id.*..... 15
5. *Against Public Policy.* Where the general public has an interest in the location of a public office, like that of a post office in a city, a contract to induce the retention of the post office at a given point, thereby restricting its location in the city to

## CONTRACT—CONTINUED:

- one place only, for individual benefit or personal gain, is against public policy, and not enforceable. *Woodman v. Innes*..... 26
6. *Sale of Land—Title—Implied Warranty.* In every contract for the sale of land there is always an implied warranty by the vendor that he has good title, unless such warranty be expressly excluded by the terms of the contract. The implied warranty exists so long as the contract remains executory, i. e., until the deed is given. *Durham v. Hadley*..... 78
7. *Title, Clouded—Purchaser, When not Compelled to Pay.* Where a purchaser enters into a written agreement with the alleged owner of certain land to purchase the same upon installments, and the purchaser afterward discovers that the title is clouded upon the records by an apparent incumbrance in such a manner as to affect the value of the property, and to interfere with the sale of the land to a reasonable purchaser, such a purchaser is not compelled to complete the payments upon his contract and trust to future litigation to clear or quiet the title. *Id.*..78, 74
8. *Agreement—Statute of Frauds.* An agreement to render services as a servant girl for another for \$100 per year, the services to commence at the date of such agreement, is not within the statute of frauds, (§ 6, ch. 43, ¶ 3166, Gen. Stat. of 1889,) as the agreement might have been performed within one year. *Aiken v. Nogle*..... 96
9. *Payment for Services.* Where services have been actually rendered to another under a verbal agreement, not binding upon the parties on account of the provision of § 6, ch. 43, requiring the agreement to be in writing if not to be performed within one year, the party benefited thereby may be compelled to pay for the same. *Id.*..... 96
10. *County Board—Void Contract.* Where a contract is entered into between two members of the board of county commissioners on the one side and an individual on the other side, outside of their county and without any previous authority having been given by the board, and such contract has never been ratified by the board, *held*, that it is void. *Comm'rs of Hamilton Co. v. Webb*..... 104
11. *Breach—Liquidated Damages—Penalty.* Kemper and Condon entered into a written contract whereby Condon agreed to build a wall, etc., or else at his election to remove a certain house three feet, and put it in as good condition as it was before; and in such contract the parties further stipulated as follows: "It is mutually agreed between said parties that a failure on the part of said Condon to perform these obligations shall entitle said Kemper to recover from him the sum of \$500 as liquidated and ascertained damages for the breach of this contract." Condon elected not to build the wall, etc., and afterward failed to remove the house. The cost of removing the house and putting it in as good condition as it was before would not have exceeded \$100. *Held*, That when the parties made the contract and stipulated for damages in case of breach, fixing the amount at \$500, they could not have had in contemplation actual compensatory damages, and therefore *held*, that the sum of \$500, mentioned in such contract as liquidated and ascertained damages, must be treated as a penalty and not as liquidated damages. *Condon v. Kemper*..... 126

## CONTRACT — CONTINUED:

12. *County Board — Void Contract with Attorneys.* A contract made by the board of county commissioners, for the county, with attorneys at law, for their services as such, which services are such as the law requires the county attorney to perform, is *ultra vires* and void. *Waters v. Trovillo*. . . . . 197
13. *Written Memorandum, not Enforced.* If the owner of land signs a writing or memorandum, wholly executory, agreeing to convey the land therein named to W., who does not sign by himself or agent, and W. does not take possession of the land, or in any other way make part performance, W. cannot be charged in an action upon the writing or memorandum which he has not signed. *Guthrie v. Anderson*. . . . . 383
14. *Part Performance, Insufficient.* The mere payment of a small part of the purchase-money by an alleged purchaser to the owner thereof is not a sufficient part performance to take the case out of the statute of frauds. *Id.*. . . . . 383
15. *Alleged Purchaser, not Charged.* Although a written memorandum concerning the sale of real estate, signed by the owners thereof, is wholly in the handwriting of an alleged purchaser, and his name is introduced in the body of the instrument as one of the terms or a part thereof, yet if he nowhere signs the same by himself or agent, the memorandum is not sufficient to satisfy the statute of frauds, so that he can be charged thereby. *Id.*. . . . . 383
16. *Partnership — Contract by Surviving Partner to Pay Firm Debts.* A contract made between a surviving partner, the widow of a deceased partner, who left minor children, and a part of the individual creditors of the deceased partner, that the surviving partner should pay a proportionate share of the individual indebtedness of the deceased partner, and retain all the partnership property, is against public policy, and is illegal and void. *Cox v. Grubb*. . . . . 435
17. *Void Contract.* A promise made by the surviving partner to a creditor of the deceased partner, in pursuance of such an agreement, to pay such creditor a proportionate share of the individual debt, is illegal and void. *Id.*. . . . . 435
18. *Personal Property, Affixed to Realty — Status.* In the sale of personal property that is to be affixed to realty, the contracting parties at the time of the sale have the power, as between themselves, at least, to fix the *status* of such property, and to say whether, when affixed to the realty of the vendee, it shall remain personal property or become a part of such realty. *Marshall v. Bachelador*. . . . . 442
19. *Homestead — Not an Improvement.* By the express terms of the contract of sale of the property for which the debt sought to be enjoined in this case was created, the ownership and possession of the property sold was to remain in H. until the price was paid. *Held*, That under such contract, as between H. and B., the property sold, though it subsequently became affixed to the homestead of B., remained personal property, and did not constitute an improvement upon the homestead; and the latter was exempt from sale to pay the debt contracted therefor. *Id.*. . . . . 442

CONTRACT—CONTINUED:

20. *State Agent—Compensation—No Appropriation—Mandamus.* In the absence of any specific appropriation by the legislature to pay for the services of a state agent appointed under the provisions of chapter 176, Laws of 1877, (§§ 5932-5935, Gen. Stat. of 1889,) the supreme court will not compel, by *mandamus* or otherwise, the governor, auditor and attorney general to enter into or execute any contract with such agent for his compensation. *The State, ex rel., v. Humphrey*..... 561
21. *Agreement, Construed—Building of College, not Ultra Vires.* The instrument sued on in this case construed, in the light of the whole record, to import an undertaking between the plaintiff and defendant. Also *held*, that, under the decisions of this court, the building of the college referred to in this case was not *ultra vires*. *Fulton v. Land Co.*..... 621
22. *Vendor and Vendee—Real-Estate Contract, Construed—Time, not of its Essence.* L. and T. sold certain real estate to B. and others, and gave to B. a bond to convey the title to B. upon certain terms and conditions. The full purchase-price of the property as shown by the bond was as follows: "\$7,000, to be paid as follows: \$1,000 cash in hand, and one note for \$1,000, due in 30 days from date hereof; and one note for \$2,500, due on or before six months from the date hereof; and one note for \$2,500 due on or before 12 months from date hereof;" and the bond provides as follows: "If said parties of the first part [the vendors] shall, on or before the 15th day of August, 1887, and upon full payment of said sum and sums of money, execute and deliver a deed of conveyance for the property to B., then the bond shall be void," etc. The above "sums of money," except about \$375.75 thereof, due on the last note, were paid, substantially, but not strictly as to time, in accordance with the terms of the contract, and L. and T. on their part, on or about February 15, 1888, executed deeds of conveyance for all the property, and all the deeds were accepted except one for a small portion of the property; and the vendees failed and refused to accept that deed or to pay the remainder of the purchase-price due for the property. *Held*, That time was not of the essence of the contract on either side, and that L. and T. may maintain the action for the remainder due on the last note given by B. and others. *Bell v. Long*..... 647
23. *Construction of Deed—Agreement to Reconvey.* S. and wife executed an instrument in the form of a warranty deed, for the conveyance of land to B., C., and B. At the time B., C. and B. entered into an agreement with S. and wife to reconvey the land described in said deed to S. and wife at the end of a year, upon the payment by S. and wife of a sum of money therein named to B., C., and B., with a stipulation that S. and wife are to occupy the land in the meantime as tenants of B., C. and B. under the deed. S. and wife did not pay, but surrendered the premises to B., C., and B. *Held*, That in view of the treatment accorded said instruments by the parties, they constituted a deed from S. and wife to B., C., and B., and a contract to reconvey from B., C. and B. to S. and wife, upon the payment of the sum of money named in said contract by S. and wife to B., C., and B. The record in this case examined, and *held*, that it discloses evidence to sustain the finding of the district court, and therefore this court will not reverse the action of said court. *Osborne v. Schoonmaker*..... 667

## CONTRACT—CONTINUED:

24. *Carriers—Live-Stock Shipments—Connecting Lines.* Where a railroad company contracts to carry stock beyond its own terminus, and there is a stipulation in the contract, which is a condition precedent to a right to recover for loss or injury, that the shipper must give written notice of his claim to an officer of the company, or its nearest station agent, before the stock is removed from the place of destination or delivery or is mingled with other stock, the officers and agents of the connecting company used and adopted by the contracting company should, for the purposes of the contract, be treated as the officers and agents of the latter company, and notice given to the agent of the connecting company at the place of destination will be sufficient. *W. & W. Rly. Co. v. Koch*..... 753
25. *Notice, not Given as Contract Required.* In the present case notice was not given to the carrier until 12 days after the delivery and removal of the stock; and under the evidence it is held, that notice was not given as the contract required, or within reasonable time. *Id.*..... 758
26. *Practice—Trial on Wrong Theory.* Where an action to recover back the purchase-money has been erroneously tried by the court below upon the theory that time was of the essence of the contract, and that the vendee upon the payment of the last installment of the purchase-money might immediately demand a deed, and if not forthcoming at once, might commence his suit to recover back his purchase-money, yet if the record shows that at the time of the trial, more than three months after the final payment and demand for a deed, and after a lapse of a reasonable time after such payment and demand, the vendor was not in a position to perform the conditions of his bond, by giving an indefeasible estate in fee-simple, the fact that the case was tried upon a wrong theory does not constitute necessarily reversible error. *Kimball v. Bell*..... 757  
See "EJECTMENT," 4.

## CONTRIBUTORY NEGLIGENCE—SEE "NEGLIGENCE," 3.

## CONVEYANCE:

1. *Public Land—Assignment of Certificate of Purchase—Not Recorded—When Void.* An assignment of the certificate of purchase of land from the United States may, under the registry laws, be proved or acknowledged and filed for record in the office of the register of deeds; and where it is neither proved nor acknowledged nor so filed for record, it is void under the registry laws of 1859 as to all subsequent purchasers for a valuable consideration without notice, (Act of 1859 relating to Conveyances, § 13,) and void under the registry laws of 1868 as to all persons except such as have actual notice of the assignment. (Act of 1868 relating to Conveyances, §§ 19, 21.) *Shippen v. Kimball*..... 173, 174
2. *Deed—Ratification of Invalid Delivery.* Where the grantee has surreptitiously obtained possession of a deed duly acknowledged, but never lawfully delivered, such possession and invalid delivery may be ratified by the subsequent acts of the grantor, which show a clear recognition and acquiescence in the grantee's title to the land conveyed by such deed. *Held*, That the evidence and special findings of fact in this case show that the

## CONVEYANCE—CONTINUED:

- grantor ratified the act of the grantee in taking into his possession the deed of June 30, 1876; and that the conclusion of law, as found by the district court, that the grantor did not ratify such possession, is not warranted by the evidence and the special findings of fact. *McNulty v. McNulty*..... 208
3. *Fraud—Evidence.* In an action to set aside a conveyance on the ground of fraud, proof was offered tending to show that the conveyance was executed when the grantor, a merchant, was financially embarrassed and practically insolvent, to his clerk, who had no money with which to pay for the property, and who gave an unsecured promissory note for the entire consideration; also, that there was an agreement between them to say to any inquirers that the consideration was the promissory note and \$500 additional, which the grantor was owing the grantee, when, in fact, no such indebtedness existed. Testimony was also offered to show that the grantee had been in the employment of the grantor for about a year, and had opportunity to know the condition of his business, and that he purchased the land without examining its quality or the condition of the title thereto. A demurrer was interposed to the testimony of the plaintiff; and it is *held*, that the evidence, measured by the rule applicable when a demurrer is filed thereto, warranted the inference that the conveyance was voluntary, and made with the intent of both grantor and grantee to hinder and delay the creditors of the former, and that it was sufficient to resist the demurrer which was interposed. *Schuster v. Kurtz*..... 255
4. *Construction of Deed—Agreement to Reconvey.* S. and wife executed an instrument in the form of a warranty deed, for the conveyance of land to B., C., and B. At the time B., C. and B. entered into an agreement with S. and wife to reconvey the land described in said deed to S. and wife at the end of a year, upon the payment by S. and wife of a sum of money therein named to B., C., and B. with a stipulation that S. and wife are to occupy the land in the meantime as tenants of B., C. and B. under the deed. S. and wife did not pay, but surrendered the premises to B., C., and B. *Held*, That in view of the treatment accorded said instruments by the parties, they constituted a deed from S. and wife to B., C., and B., and a contract to reconvey from B., C. and B. to S. and wife, upon the payment of the sum of money named in said contract by S. and wife to B., C., and B. The record in this case examined, and *held*, that it discloses evidence to sustain the finding of the district court, and therefore this court will not reverse the action of said court. *Osborne v. Schoonmaker*..... 667

## CORPORATIONS:

*Rights of Stockholders and Creditors.* T. and P. were members of a corporation. The company, being in debt, conveyed its real estate to P., in trust, upon which to borrow money to pay indebtedness, but P. afterward refused to recognize the trust, and claimed the property as his own. T. was an indorser and guarantor of the company, and to protect himself was compelled to take an assignment of a judgment obtained by a creditor against the company. He caused a levy to be made upon the property transferred to P. and also began proceedings to cancel and set aside the conveyance to P., and to have the property subjected to the payment of his judgment. P. claimed



## CORPORATIONS—CONTINUED:

that the company was owing him a large sum of money. Afterward the land was sold on execution levied at the instance of T. A sale was fairly and regularly made of the property to T., was confirmed by the court, and a sheriff's deed made to the purchaser. Afterward, P. proposed to pay T. the amount of his claim, but no actual tender was made, nor was any proposal made until after the claim was extinguished by the sale and conveyance of the property to T. On the trial the issues were found in favor of T. P. then asked the court to fix a short time within which he could pay off T.'s judgment and take the land free from the lien of such judgment, but the request was refused, and a judgment canceling the deed of the company to P. was entered. *Held*, That the refusal and entry of judgment were not erroneous. *Pickens v. Taylor*..... 294

CORPORATE EXISTENCE—SEE "COUNTIES, AND COUNTY OFFICERS," 5.

COSTS IN CRIMINAL CASES—SEE "CRIMINAL LAW," 27.

COUNTERCLAIM—SEE "MECHANICS' LIENS," 1.

COUNTY AGRICULTURAL SOCIETY—SEE "AGRICULTURE."

COUNTY ATTORNEY—SEE "COUNTIES, AND COUNTY OFFICERS," 4.

COUNTY AUDITOR—SEE "COUNTIES, AND COUNTY OFFICERS," 7.

COUNTY BOARD—SEE "COUNTIES, AND COUNTY OFFICERS," 3, 4, 8, 9, 10, 11, 12, 13.

COUNTY COMMISSIONERS—SEE "COUNTIES, AND COUNTY OFFICERS," 3, 4, 8, 9, 10, 11, 12, 13.

COUNTY PRINTING—SEE "COUNTIES, AND COUNTY OFFICERS," 8, 9, 10.

## COUNTIES, AND COUNTY OFFICERS:

1. *Plea, Bad*. The plea of a subsequent county-seat election held bad, upon the same authority. *The State, ex rel., v. Burton*... 44
2. *Valid Statute*. The act entitled "An act to legalize a certain election in Cheyenne county, and to declare the town of St. Francis the permanent county-seat of said county," approved February 5, 1891, is constitutional and valid. *Id.*..... 44
3. *Void Contract*. Where a contract is entered into between two members of the board of county commissioners on the one side and an individual on the other side, outside of their county, and without any previous authority having been given by the board, and such contract has never been ratified by the board, *held*, that it is void. *Comm'rs of Hamilton Co. v. Webb*..... 104
4. *Void Contract with Attorneys*. A contract made by the board of county commissioners, for the county, with attorneys at law, for their services as such, which services are such as the law requires the county attorney to perform, is *ultra vires* and void. *Waters v. Trovillo*..... 197
5. *Corporate Existence—Collateral Attack*. Where a public organization, of a corporate or quasi-corporate character, has an

COUNTIES, AND COUNTY OFFICERS—CONTINUED:

- existence in fact, and is acting under color of law, and its existence is not questioned by the state, its existence cannot be collaterally drawn in question by private parties. *In re Short, Petitioner*..... 250
6. *Validity of County Organization.* Therefore, where a county has been organized under valid laws, and is acting as a county under valid laws, and a judgment is rendered in such county or by virtue of proceedings commenced in such county against an individual, providing for his imprisonment because of his having committed a public offense in such county, and under the judgment he is imprisoned, such individual cannot, in a proceeding in *habeas corpus*, attack the validity of the existence of such county upon the ground merely that "the plats, field-notes and records of the original government survey now on file in the office of the auditor of state in the state capitol" show that the county, as originally created by the legislature, and as afterward organized and as now existing, contains only 430½ square miles in area, while the constitution requires that no county shall be organized with a less area than 432 square miles. (Const., art. 9, § 1.) *Id.*..... 250
7. *County Auditor, When.* After chapter 87 of the Laws of 1891 was passed and took effect, there could be no such officer as county auditor in any county with less than 45,000 inhabitants, except in Leavenworth county. *Lawson v. Comm'rs of Reno Co.*..... 271
8. *Control of County Printing—Injunction.* Under § 1655 of the General Statutes of 1889, the boards of county commissioners of the several counties of the state have exclusive control over the county printing; and, in the absence of fraud or collusion, injunction will not lie to restrain the board from paying for such county printing at legal rates, although other parties may have been willing and did offer to do the county printing for a less sum than the amount fixed by law for doing such work. *Comm'rs of Harper Co. v. The State, ex rel.*..... 283
9. *County Printing—Setting Aside Contract.* Mere threats by county commissioners to ignore and set aside a contract let by them for the county printing, in the absence of any official offer or attempt to ignore or set aside such contract, do not constitute grounds for an injunction. *Comm'rs of Seward Co. v. Stoufer.*..... 287
10. *Injunction, When.* Some step must be taken by the commissioners as a board toward setting aside the contract before an injunction can issue. *Id.*..... 287
11. *Recognition of Member—Mandamus.* *Mandamus* will not lie to compel one of the members of a board of county commissioners and the county clerk to recognize a person as county commissioner who has had a judgment rendered against him in a contest proceeding, instituted to determine who was elected to such office, and who has also been ousted from the office by a judgment of the district court in proceedings in *quo warranto*. The peremptory writ of *mandamus* should not issue unless there is a clear and specific legal right to be enforced, and there is no other particular and adequate legal remedy. *Swartz v. Large,* 304

## COUNTIES, AND COUNTY OFFICERS—CONTINUED:

12. *Highway—Establishment—No Notice—Waiver.* Where no notice is given to one of the owners through whose land a public highway is laid out, nor any finding made by the board of county commissioners that the land-owner is a non-resident of the county, the want of jurisdiction by the absence of notice or such a finding is cured by the presentation by him to the board of county commissioners of a claim for damages in consequence of the opening of the road through his land. (*Comm'rs of Woodson Co. v. Heed*, 33 Kas. 34, cited and followed.) *The State v. Hedeon*..... 402
13. *No Lawful Obstruction, When.* After a public highway has been established and ordered to be opened, and the land-owner presents to the board of county commissioners a claim for damages and compensation on account of the laying out of such road across his land, and the same is allowed, from which no appeal is taken, even if the notice to open the road directed to the land-owner is irregular or defective, but the overseer, after giving a notice, actually proceeds to open the road, the land-owner cannot thereafter lawfully obstruct the same. *Id.*..... 402
14. *Probate Judge—Salary.* A probate judge is entitled to be paid the salary provided for by ¶ 2524, General Statutes of 1889, without proof that he had actually performed the services contemplated by the "act relating to intoxicating liquors." *Comm'rs of Miami Co. v. Collins*..... 417
15. *County Bridge—Tax—Void Levy.* The levy of a 1-mill tax for building county bridges, the cost of which is payable out of the fund provided for the current expenses of the county, where the levy for county expenses is already up to the limit allowed by statute, is unauthorized and void. *A. T. & S. F. Rld. Co. v. Comm'rs of Atchison Co.*..... 722

## CREDITOR—SEE "CORPORATIONS."

## CRIMINAL LAW:

1. *Embezzlement—Sufficient Information.* An information for embezzlement under § 90 of the crimes act charged that "one A. M. Fearn did intrust to William Combs, for safe custody, \$530, current money of the United States, of the value of \$530, he, the said William Combs, receiving and accepting the same as the bailee of said A. M. Fearn; that said \$530 consisted of United States national bills, commonly called greenbacks, and national bank bills, silver certificates, and gold certificates. The denominations and names of each are unknown to said A. M. Fearn, the prosecuting witness, or your informant, but they all pass as current money of the United States, and all were of the value of \$530. That after the said William Combs received said current money, as aforesaid, as such bailee, and on said 10th day of March, 1891, at the county of Harvey, in the state of Kansas, did then and there unlawfully and feloniously embezzle and convert to his own use, and make way with and secrete said \$530, current money of the United States, and of the value of \$530, belonging to and being then and there the money and property of said A. M. Fearn, without the authority, knowledge or consent of said A. M. Fearn; and then and there, in the manner aforesaid, the said money, the property of said A. M. Fearn, did unlawfully and feloniously steal, take, and

CRIMINAL LAW—CONTINUED:

- carry away." Upon a motion in arrest of judgment, it was objected that the information did not specify the nature of the bailment; that it did not contain an allegation of intent; and that it did not describe the money alleged to have been embezzled with a reasonable degree of certainty. *Held*, That the information is not fatally defective upon any of the grounds mentioned, and that its allegations are sufficient to resist objections which were not made until after trial and verdict. *The State v. Combs*..... 186
2. *Information—Description of Defendant.* *Held*, Under the corrected record in this case, that the defendant was properly described in the count of the information upon which he was convicted. *The State v. McLafferty*..... 140
3. *Instructions, not Misleading.* Certain instructions considered, and *held* not to be misleading or erroneous, when considered with the entire charge to the jury. *Id*..... 140
4. *Oral Statements by Court to Jury—New Trial Denied.* The mere fact that the court made certain oral statements to the jury in relation to their agreeing upon a verdict, after they had retired to consider their verdict and had been returned into court, but did not direct them upon any rule of law involved in the trial, or make any comment upon the testimony, is not such an instruction as is required to be in writing, in accordance with §236 of the criminal code; and while such statements may be subject to criticism, and ought not to have been made to the jury, still they are not considered sufficiently prejudicial to grant a new trial in a case where, from the entire record, the guilt of the defendant clearly appears. *Id*..... 140
5. *Information—Joinder of Counts.* A count for maintaining a nuisance, under §18 of the prohibitory law, may be joined in an information with one or more counts charging illegal sales of intoxicating liquors, under §7 of the same law. The record examined, and *held*, that no substantial error exists therein. *The State v. McLaughlin*..... 148
6. *Larceny—Sufficient Taking and Carrying Away.* Where a person obtains possession of a horse with the consent of the owner, by falsely and fraudulently pretending that he wants to use him a short time for a temporary purpose, and will return him to the owner at a specified time, when in fact he intends to and does wholly deprive the owner of the horse and appropriates him to his own use, there is such a taking and carrying away as to constitute the offense of grand larceny. *The State v. Woodruff*..... 151
7. *Immaterial Evidence.* The admission of improper and immaterial evidence, not prejudicial to the complaining party, is not a ground of reversal. *Id*..... 152
8. *Evidence—No Error.* The evidence examined, and found, that no error was committed in excluding certain testimony. *The State v. Eberline*..... 155
9. *Witness—Character.* While evidence of a witness's bad character for veracity is admissible, such inquiry must be confined to the character of such witness for truth and veracity. *Id*... 155
10. *Instructions—No Error.* Instructions given and refused considered, and found, that no error was committed. *Id*..... 155

## CRIMINAL LAW—CONTINUED:

11. *Prosecution, Premature.* Prosecution under an act not yet published is prematurely brought. *In re Swartz, Petitioner*..... 157
12. *Murder—Amended Information—Practice.* An information was filed charging the defendant with murder in the first degree. Subsequently the defendant was tried, convicted, and, upon appeal to the supreme court, the conviction was set aside and a new trial granted. Thereafter, the county attorney, without consent of the court, and without notice to or the consent of the defendant, filed an amended information, also charging the defendant with murder in the first degree. The defendant made no motion to strike the amended information from the files, but filed a motion to quash, upon the ground, among others, that the information was filed without leave of the court and without notice to him or his consent. After the motion to quash was filed, and before it was passed upon by the court, the prosecution obtained leave of the court to indorse the names of additional witnesses upon the amended information. The defendant objected, but notified the court that he desired a copy of the amended information to be served upon him. Subsequently, he refused to plead to the amended information, and asked to be tried upon the old information. The court directed a plea of not guilty to be entered for the defendant upon the new or substituted information, and required him to be tried thereon. He was subsequently convicted of manslaughter in the first degree. *Held*, That the amended or substituted information must be considered as occupying the same position, after the indorsements of the names of additional witnesses thereon and the refusal to quash, as if the court had expressly allowed the information to be amended or substituted and filed. *The State v. Spendlove*..... 160
13. *Statute, Construed.* Section 12, chapter 81, of the act relating to crimes and punishments, (§ 2133, Gen. Stat. of 1889,) is expressly applicable to all crimes or misdemeanors, not amounting to felony, and an assault and battery is within the statute. Intentional violence upon the person killed is not excluded by the statute. *Id.*..... 160
14. *Judgment—Technical Errors.* Judgment must be given in the supreme court upon appeal in criminal cases without regard to technical errors or instructions which do not affect the substantial rights of the parties. *Id.*..... 160
15. *Voters—Registration—Compliance with Law.* A slight departure from some directory provision of the act relating to the registration of voters in cities, without any fraudulent intent on the part of the officer, and which in its nature and effect cannot injure anyone or operate to interfere with or defeat the purpose of the act, is not punishable as a felony, or within the penalty described in § 15 of the act. *The State v. Bush*.... 201
16. *Forgery—Information.* It is proper to charge, in separate and distinct counts of the same information, the forgery of a promissory note, and the selling, exchanging or uttering of it as genuine. *The State v. Zimmerman*..... 242
17. *Evidence—Comparison of Signatures.* Where, in a criminal case, a defendant is charged with the forgery of a note and mortgage, and the state and the defendant both prove upon the trial that a former mortgage offered in evidence was signed

CRIMINAL LAW — CONTINUED:

by the party whose signature is charged to have been forged, such former mortgage is competent evidence to be examined by the jury for the purpose of comparing the genuine signature upon the former mortgage with those disputed and denied, to assist in determining whether the latter were genuine. *Id.*..... 242

18. *Intoxicating Liquor—Illegal Sales—Information—Evidence.* Where a county attorney files an information charging the defendant with illegal sales of intoxicating liquor, and positively verifies the same, but files therewith, and by special averment makes a part thereof, a sworn statement of a private person who testified to illegal sales made to him by the defendant, and such person is not used as a witness at the trial, but the county attorney elects to rely on another sale made to a different person, and it sufficiently appears that at the time of the filing of the information neither the county attorney nor the person who made the sworn statement had notice or knowledge of the particular offense relied upon for conviction, the defendant should not be found guilty of such particular offense. The case of *The State v. Brooks*, 33 Kas. 708, cited, and followed. *The State v. Nully.*..... 259

19. *Intoxicating Liquors—Abatement of Nuisance.* The judge of the district court has no authority to make an order at chambers abating a place as a nuisance where intoxicating liquors are alleged to have been sold in violation of law, and forever enjoining the owner, lessee or keeper from maintaining such place. *In re Harmer, Petitioner.*..... 262

20. *Intoxicating Liquor—Unlawful Sale—Competent Juror.* In a criminal prosecution, where the defendant was charged with keeping and maintaining a nuisance, to wit, a place for the sale of intoxicating liquors, a person who was called as a juror was shown by his own testimony to be a member of an organization called the "Good Templars," whose object was as follows: "He did not understand the special object of such organization to be the enforcement of said [prohibitory liquor] law among others, but to promote temperance among its members by moral suasion." *Held*, That such person was not shown by the foregoing to be incompetent to serve as a juror in the case. And in such a case it is not error for the trial court to permit the prosecution to introduce evidence of other sales of intoxicating liquors than those of which the county attorney or the prosecuting witness had knowledge prior to the commencement of the prosecution. *The State v. Estlinbaum.*..... 291, 292

21. *Malicious Prosecution—Probable Cause—Liability.* In an action for malicious prosecution upon a charge of malicious trespass, where there was probable cause for commencing the prosecution, and where the defendant, acting upon the advice of attorneys, and believing there was probable cause, in good faith and without malice caused the arrest of the plaintiff, the defendant is not liable to the plaintiff, although one of his purposes was to prevent the construction of a building upon his land. *Jackson v. Linnington.*..... 896

22. *Homicide—Preliminary Examination—Plea in Abatement not Sufficient.* Where the defendant in a criminal prosecution in the district court, who is charged upon information with com-

## CRIMINAL LAW — CONTINUED:

- mitting murder, files a plea in abatement, setting forth that he has not had a preliminary examination or waived the same, except upon a warrant of arrest which he claims does not charge murder, and in his plea he does not state that he has not had any preliminary examination at all, or that the evidence upon the preliminary examination did not prove murder, and does not state that at the time when the information was filed in the district court he was not a fugitive from justice, *held*, that such plea in abatement is not sufficient. *The State v. Riggs*..... 507
23. *Intoxicating Liquors — Illegal Sales — Prosecution — Waiver of Defects.* Where a criminal warrant is issued upon an information charging the defendant with the unlawful sale of intoxicating liquor, and the defendant, without at first making any objection to the sufficiency of the warrant or the sufficiency of the verification of the information, files a sworn petition for a removal of the cause to the circuit court of the United States for the district of Kansas, in which verified petition he seeks to justify his illegal sales as those of original packages, made by him as resident agent for non-resident proprietors, he waives any supposed defects or irregularities in the issuance of the warrant, and cannot for that reason afterward have the warrant quashed or set aside on his motion. (The case of *The State v. Longton*, 35 Kas. 375, cited and followed.) *The State v. Tuchman*..... 726
24. *Contempt of Court — Procedure — Privilege of Accused.* Where proceedings for contempt of court are instituted against a party, whereby he is charged with inducing witnesses to absent themselves from court and otherwise avoid the process of the court, it is error for the state to place the accused upon the witness stand to prove the contempt charged. The offense being made a crime by statute, the accused cannot be compelled to give evidence which might criminate himself. *In re Nickell, Petitioner*..... 734
25. *Case, Followed.* The rule to show cause why a party should not be punished for a constructive contempt of court should be based upon a verified complaint or information. (*The State v. Henthorn*, 46 Kas. 618, followed.) *Id.*..... 734
26. *Disorderly Conduct — Complaint.* A complaint charging that H., on the 6th day of July, 1889, at the city of Topeka, county of Shawnee and state of Kansas, unlawfully and willfully disturbed the peace and quiet of the city of Topeka, by the use of loud, profane and indecent language, states an offense under § 22 of ordinance 861 of said city. The evidence examined, and *held* sufficient to support a finding by the jury that the peace of the city was disturbed by the defendant as alleged. *City of Topeka v. Heitman*..... 739
27. *Costs in Criminal Cases — Liability of Complaining Witness — Constitutional Law.* Section 326 of the criminal code, which provides that a prosecuting witness may be committed for his failure to pay costs when the jury find the defendant not guilty, and also find that the prosecution was instituted from malicious motives and without probable cause, is not unconstitutional. (*In re Ebenhack*, 17 Kas. 618, followed.) *In re Lowe, Appellant*..... 769

CRIMINAL LAW—CONTINUED:

28. *Contempt in Facie Curie—Summary Punishment.* When the contempt sought to be punished is committed in *facie curie*, the punishment is summary, and generally immediately follows its commission. (*The State v. Henihorn*, 46 Kas. 613.) *In re Noonan, Petitioner*..... 771

D.

DAMAGES:

1. *Warranty—Breach.* In an action for damages for a breach of warranty concerning the quality of certain paint, probable or future damages, which are not certain, fixed, or liquidated, cannot be allowed. *Paint Co. v. Glover*..... 15
2. *Nominal Damages.* If there is a breach of warranty in the sale of personal property on the part of the seller, the right of nominal damages exists at once in favor of the purchaser. *Id.*.... 15
3. *Elements of Damages.* If a breach of warranty on the part of the seller in the sale of paint, or any similar article of use, has involved the purchaser in a legal liability to pay money, or to incur expense to other parties for whom he did work with the paint or other article, to relieve himself against the effects of the bad quality of the paint or other article, such liability or expense, if certain, fixed, or liquidated, whether paid or not, constitutes an element of damages for which the defendant is entitled to recover. *Id.*..... 15
4. *Dangerous Machine—Owners Liable for Loss of Hand.* When the owners of a horse-power threshing machine are guilty of gross negligence by leaving the bevel-wheel and cogs uncovered, knowing them to be imminently dangerous to human life and limb in this uncovered condition, and a workman engaged in threshing with the machine in this condition attempts to oil the cylinder without the knowledge of the uncovered condition of the bevel-wheel and cogs, and in this attempt loses his hand, the owners of the machine are liable for damages occasioned by such injury. *Mastin v. Levagood*..... 36
5. *Duty of Actor.* In any voluntary act which may naturally result in the injury of another, the actor must see to it, at his peril, that injury does not follow, or he must respond in damages therefor. *Id.*..... 36
6. *Duty of Owners—Danger, Foreseen.* When danger is foreseen and pointed out to the owners of a threshing machine by the uncovered condition of the bevel-wheel and cogs, a duty is imposed upon them to use every possible precaution to avoid injury to those engaged in operating the machine or working about it. *Id.*..... 36
7. *Contract—Breach—Liquidated Damages—Penalty.* Kemper and Condon entered into a written contract whereby Condon agreed to build a wall, etc., or else at his election to remove a certain house three feet, and put it in as good condition as it was before; and in such contract the parties further stipulated as follows: "It is mutually agreed between said parties that a failure on the part of said Condon to perform these obligations shall entitle said Kemper to recover from him the sum of \$500 as liquidated and ascertained damages for the breach of this contract." Condon elected not to build the wall, etc., and after-



## DAMAGES—CONTINUED:

ward failed to remove the house. The cost of removing the house and putting it in as good condition as it was before would not have exceeded \$100. *Held*, That when the parties made the contract and stipulated for damages in case of breach, fixing the amount at \$500, they could not have had in contemplation actual compensatory damages, and therefore *held*, that the sum of \$500, mentioned in such contract as liquidated and ascertained damages, must be treated as a penalty and not as liquidated damages. *Condon v. Kemper*..... 126

8. *Master and Servant—Death by Wrongful Act—Action by Parents—Excessive Verdict*. In an action brought for the benefit of the parents, as next of kin, to recover for the alleged negligent killing of their son, who was grown up, of full age, and living apart from them, but was unmarried, no proof was offered of the parents' financial condition, or that they had ever received any actual pecuniary benefits from the son during his life-time; nor was there any evidence showing a reasonable probability of pecuniary advantage to them from the continuance of the son's life. *Held*, That a verdict awarding them \$1,500 as damages was excessive, and that under such evidence no more than nominal damages were recoverable. The evidence of negligence produced upon the trial examined, and *held* to be sufficient to warrant the court in submitting the case to the jury. *Coal Co. v. Limb*..... 469

9. *Master and Servant—Dangerous Machinery—Liability for Damages*. When the owners of a horse-power threshing machine are guilty of gross negligence by leaving the bevel-wheel and oogs uncovered, knowing them to be imminently dangerous to human life and limb in this uncovered condition, and a workman engaged in threshing with the machine in this condition attempts to oil the cylinder without the knowledge of the uncovered condition of the bevel-wheel and oogs, and in this attempt loses his hand, the owners of the machine are liable for damages occasioned by such injury. *Martin v. Levagood*.... 764  
See "RAILROADS, AND RAILROAD COMPANIES," 2, 5, 17.

DANGER—SEE "DAMAGES," 4, 5, 6.

DANGEROUS EMPLOYMENT—SEE "RAILROADS, AND RAILROAD COMPANIES," 11.

DANGEROUS MACHINERY—SEE "DAMAGES," 4, 9.

DEDICATION—SEE "HIGHWAY," 4.

DEED—SEE "CONVEYANCE."

DEFECTIVE RECORD—SEE "PRACTICE, SUPREME COURT," 1.

DEFECTIVE TITLE—SEE "TITLE," 8.

DEFECT OF PARTIES—SEE "PARTIES."

DEFUNCT JUDGMENT—SEE "JUSTICES, AND JUSTICES' COURTS," 8.

DEMAND—SEE "LIMITATION OF ACTIONS," 3.

DEMURRER—SEE "EVIDENCE," 7.

DEMURRER TO EVIDENCE—SEE "JUSTICES, AND JUSTICES' COURTS," 4; "PLEADING AND PRACTICE," 71.

DISCRETION OF COURT—SEE "PLEADING AND PRACTICE," 16, 56.

DISMISSAL—SEE "ACTION," 13.

DISORDERLY CONDUCT—SEE "CRIMINAL LAW," 26.

DISSOLUTION—SEE "ATTACHMENT," 8.

DUTY OF ACTOR—SEE "ACTION," 3.

## E.

EIGHT-HOUR LAW—SEE "STATUTE," 6.

### EJECTMENT:

1. *Rights of Person Holding under Tax Deed.* Where the holder of a tax deed is defeated in an action for the recovery of land sold at the tax sale and described in the tax deed, and, the successful claimant is adjudged to pay the holder of the tax deed the taxes, interest, costs, etc., as allowed by law, before he is let into possession, such holder of the tax deed is entitled to retain the possession of the land until the successful claimant pays the taxes, interest, costs, etc., as required of him by the judgment of the court. *Rose v. Newman*. . . . . 18
2. *Action, Barred.* Where a person has been in the actual and exclusive possession of real estate, claiming to be the owner thereof under a guardian's sale and deed, for more than 15 years, and the minor whose land was sold and conveyed, and who is a female, attained her majority in the meantime by arriving at the age of 18 years, and also in the meantime permitted more than two years after attaining her majority to elapse before she commenced any action to disturb the possession of the person holding under the guardian's sale and deed or to question his ownership with regard to the land, *held*, that any cause of action which she might have had because of such adverse possession and claim of ownership is barred by the 15-years' statute of limitations. (Civil Code, § 16, subdiv. 4.) *Howbert v. Heyle*. . . . . 58
3. *Town-Site Certificates—Tax Deeds—Paramount Title.* In an action for the recovery of real estate, where the plaintiff claimed title under a certificate issued by a town-site company, duly assigned, showing that the holder was entitled to a good and sufficient warranty deed, as soon as such company should receive the title to the town-site, and such town-site company obtained the title through the probate judge, but never made a deed to the assignee of such certificate, and the corporation expired by limitation, and the defendant claimed under tax deeds, which were void; and the fact was that he had been in possession of the premises and made lasting and valuable improvements thereon, more than one year before suit was brought: *Held*, That the plaintiff's title was paramount to that of the defendant, and that he was entitled to recover as the equitable owner of such real estate. *Riggs v. Anderson*. . . . . 66
4. *Does not Lie.* Where an owner of land enters into a parol contract with a railroad company authorizing it to take the pos-

**EJECTMENT—CONTINUED:**

session of a portion of his land for a right-of-way and to construct its railroad across the same, for which the railroad company agrees to pay him \$75, and the railroad company, with the knowledge and consent of the owner, takes the possession of the property and constructs its railroad across the same, but does not pay him the \$75 nor any part thereof, the owner cannot then maintain an action in the nature of ejectment to evict the railroad company from the premises and to prevent it from using its railroad, but his remedy is an action for the \$75. *Mo. Pac. Rly. Co. v. Gano*..... 457

5. *Mortgage—Foreclosure—Forgery—Evidence.* In an action of ejectment brought against the grantee of a purchaser at a judicial sale made in an action of foreclosure, it is competent for the plaintiffs in the ejectment action to show that the mortgage was a forgery, and that the persons purporting to have executed the same were not served by process in the foreclosure suit. *Pray v. Jenkins*..... 599

**EMBEZZLEMENT—SEE “CRIMINAL LAW,” 1.**

**EMINENT DOMAIN—SEE “RAILROADS, AND RAILROAD COMPANIES,” 4, 16.**

**ENACTMENT—SEE “STATUTE,” 7.**

**EQUITY—SEE “MORTGAGE,” 1.**

**ERROR:**

1. *Hearsay Testimony—No Material Error.* Where hearsay testimony is introduced in the trial of an action, but it appears that the adverse party's rights were not thereby prejudiced, *held*, that no material error was committed. *A. T. & S. F. Rld. Co. v. Collins*..... 11
2. *Note—Action—Unverified Answer—Pleading Payment.* In an action on a note and mortgage, where the petition is sworn to, an unverified answer alleging payment and satisfaction of the debt will put in issue the question of payment, and it is error for the trial court to render judgment on the pleadings in favor of the plaintiffs. *O'Bryan v. Standiford*..... 24
3. *Bill of Particulars—Practice.* Where a bill of particulars states an action in trespass *quare clausum fregit* only, and the bill of particulars also shows that the action arose in the state of Nebraska, it is error to overrule a demurrer to such bill of particulars on the ground that it does not state a cause of action. *Brown v. Irwin*..... 50
4. *Intoxicating Liquor—Illegal Sales—Information—Evidence.* Where a county attorney files an information charging the defendant with illegal sales of intoxicating liquor, and positively verifies the same, but files therewith, and by special averment makes a part thereof, a sworn statement of a private person who testified to illegal sales made to him by the defendant, and such person is not used as a witness at the trial, but the county attorney elects to rely on another sale made to a different person, and it sufficiently appears that at the time of the filing of the information neither the county attorney nor the person who made the sworn statement had notice or knowledge of the particular offense relied upon for conviction, the defendant

## ERROR—CONTINUED:

- should not be found guilty of such particular offense. The case of *The State v. Brooks*, 33 Kas. 708, cited, and followed. *The State v. Nulty* ..... 259
5. *Constructive Contempt*. It is error for a court or judge in any case to proceed against a person for a constructive contempt, without an affidavit or information in writing, containing a statement of facts constituting the contempt charged, being first filed in court or submitted to the judge. *In re Harmer, Petitioner*..... 262
6. *Erroneous Proceedings by Administratrix*. When the administratrix of the estate of a deceased member of a copartnership consisting of two persons, without citing the surviving partner, and without executing the further bond, commences proceedings in the probate court under §§ 2982, 2983, 2984, 2985, 2986, or under §§ 2821 and 2822, against the surviving partner and other persons, to get possession and control of the partnership property, it is error not to dismiss such proceedings on motion made for that purpose. *Teney v. Laing*..... 297
7. *Landlord and Tenant—Estoppel*. A landlord who, having leased a portion of a building to H., and who informs W., occupying the balance of the building under a lease which is about to expire, that he has leased the whole building to H. from the expiration of his (W.'s) lease, with authority on the part of H. to sub-let, and advises W. to lease of H., and W. leases of H., is estopped from denying the authority of H. to sub-let to W. And the privies of said landlord taking under him by a subsequent lease are also estopped. The evidence examined, and held not to establish any cause of action in favor of the plaintiff below, and that the court erred in overruling the demurrer thereto. *Hill v. Wand*..... 340
8. *Instruction*. Where the burden of proof under the pleadings and the law rests upon the defendant, it is material error for the court to instruct the jury otherwise. *Machine Co. v. Morse*, 429
9. *Continuance—Refusal, Error*. There was an agreement between counsel for plaintiff and defendant that the testimony given by certain witnesses in a former case should be transcribed and used as a deposition in the present case, and the party in whose favor the testimony was given relied on the agreement, and did not procure the attendance of the witnesses, but at the trial the testimony of such witnesses, which is material and important, and which, if treated as a deposition taken in this case, would have been competent and admissible, was excluded from consideration upon the objection of the opposing party. The other party then applied for a continuance of the cause on account of the exclusion of the testimony and the inability to otherwise obtain the same, which application was denied. Held, Error. Either the testimony should have been received or the continuance granted. The testimony in the case tending to sustain the charge of negligence as made examined, and held to be sufficient to take the case to the jury. *Coal Co. v. Wilson* ..... 460
10. *Special Questions—Refusal, Error*. When a party to an action in a proper manner requests the court to submit to the jury proper special interrogatories to be answered by the jury, the court commits error if it refuses to so submit them. *Jones v. Annis*..... 479

## ERROR—CONTINUED:

11. *Pleading—Supplemental Petition.* Where the facts existing at the time of and before the trial, in any case, would authorize the plaintiff to recover, provided they were properly pleaded and proved, but some of them, which were properly pleaded but are not sufficient to authorize a recovery, took place prior to the commencement of the action, and the others, which are not pleaded and are not sufficient to authorize a recovery, took place afterward, the plaintiff may, under § 144 of the civil code, set forth in a supplemental petition, upon such terms as to costs as the court might prescribe, the facts which took place after the commencement of the action; and it would be error for the court to refuse to permit the same to be done. *Austin v. Jones* ..... 565
12. *Eminent Domain—Appeal—Evidence.* Upon an appeal from a proceeding to condemn a right-of-way for a railroad, testimony of the amount awarded by the commissioners is not admissible in evidence, and a statement made by the court in its charge to the jury, informing them of the amount so awarded by the commissioners, is unwarranted and erroneous. *C. K. & N. Rly. Co. v. Broquet*..... 571
13. *Statement of Court—Prejudicial Error.* One of the controverted questions on the trial of the appeal was the ownership of the land taken. Before the trial the railway company made a written offer to allow judgment to be taken against it in favor of B. for \$1,000 and costs. The offer was not accepted, and the parties proceeded to trial. After the evidence had been offered and the charge of the court had been given, the court stated in the presence and hearing of the jury that "the Chicago, Kansas & Nebraska Railway Company has filed a paper in this case in which it recognizes Ernest Broquet as defendant or party in interest herein, and in which it made a certain offer to settle with said Broquet for damages to the land in question." *Held*, That, under the issues and circumstances of this case, the making of the statement was prejudicial error. *Id* ..... 571
14. *Errors of Law—Waiver.* Errors of law occurring at the trial must be assigned for cause in a motion for a new trial, and if this is not done this court will not pass upon them. *The State v. Tushman*..... 726
15. *Contempt of Court—Procedure—Privilege of Accused.* Where proceedings for contempt of court are instituted against a party, whereby he is charged with inducing witnesses to absent themselves from court and otherwise avoid the process of the court, it is error for the state to place the accused upon the witness stand to prove the contempt charged. The offense being made a crime by statute, the accused cannot be compelled to give evidence which might criminate himself. *In re Nickell, Petitioner* ..... 784

## ESTOPPEL:

1. *Acts to be Pleaded.* All acts, representations and conduct relied on as an estoppel should be specially pleaded before evidence to establish the same can be received. *Insurance Co. v. Johnson*..... 1
2. *Landlord and Tenant.* A landlord who, having leased a portion of a building to H., and who informs W., occupying the

**ESTOPPEL—CONTINUED:**

balance of the building under a lease which is about to expire, that he has leased the whole building to H. from the expiration of his (W.'s) lease, with authority on the part of H. to sub-let, and advises W. to lease of H., and W. leases of H., is estopped from denying the authority of H. to sub-let to W. And the privies of said landlord taking under him by a subsequent lease are also estopped. The evidence examined, and held not to establish any cause of action in favor of the plaintiff below, and that the court erred in overruling the demurrer thereto. *Hill v. Wand*. . . . . 340

3. *Homestead—What Constitutes—Highway—Dedication.* The owner of a strip of land whose acts have been such as to estop him from denying that it is a public road, and have induced the public to use it as such, and have caused the officers of the township and the overseer of the road district in which it is situate to work and improve it, is entitled to hold as a homestead a tract of land on both sides of such strip of land consisting of less than 30 acres. *Griswold v. Huffaker*. . . . . 690

See "JUSTICES, AND JUSTICES' COURTS," 10.

**EVIDENCE:**

1. *Fractions of a Day—Judicial Notice.* Where it is necessary to justice, and it can be done, the courts may take notice of the fractions of a day; and the precise time when an act is done may be shown. *Coal Co. v. Barber*. . . . . 29
2. *Statute—Taking Effect.* Where a statute provides that it shall take effect "from and after its publication," in computing the time when it takes effect, the day of its publication is to be included; but the precise time of its publication, or taking effect, may be shown, where an act is done on the same day of its publication, if the hour of publication affects such act in any way. *Id.*. . . . . 29
3. *Immaterial Evidence.* The admission of improper and immaterial evidence, not prejudicial to the complaining party, is not a ground of reversal. *The State v. Woodruff*. . . . . 152
4. *Findings—Judgment, When not Reversed.* Where special findings are immaterial, a judgment will not be reversed, although there may be no evidence to support such findings. *Booge v. Scott*. . . . . 247
5. *Intoxicating Liquor—Unlawful Sale—Competent Juror.* In a criminal prosecution, where the defendant was charged with keeping and maintaining a nuisance, to wit, a place for the sale of intoxicating liquors, a person who was called as a juror was shown by his own testimony to be a member of an organization called the "Good Templars," whose object was as follows: "He did not understand the special object of such organization to be the enforcement of said [prohibitory liquor] law among others, but to promote temperance among its members by moral suasion." *Held*, That such person was not shown by the foregoing to be incompetent to serve as a juror in the case. And in such a case it is not error for the trial court to permit the prosecution to introduce evidence of other sales of intoxicating liquors than those of which the county attorney or the prosecuting witness had knowledge prior to the commencement of the prosecution. *The State v. Estlinbaum*. . . . . 291, 292

## EVIDENCE — CONTINUED:

6. *As to Signature.* Where the trial court permits a witness, over the objection of the defendants, to write his signature in the presence of the jury, for their inspection and comparison with a signature to a chattel mortgage which is claimed to have been forged, and afterward, upon cross-examination, the defendants ask the witness to stand up and write his name in the presence of the jury, and then offer the same in evidence, *held*, that the defendants cannot now complain of such evidence. *Allen v. Gardner* ..... 337
7. *Demurrer — Objection to Evidence — Trial.* On the trial of a cause, a defendant may object to the reception by the court of any evidence under the petition, although his demurrer to the same petition has previously been overruled; and the court commits no error by entertaining and passing upon said objection. *Goodrich v. Comm'rs of Atchison Co.* ..... 355
8. *Ownership — Pleading and Proof.* A plaintiff alleging ownership of property at a certain time is not restricted, as to the evidence of such ownership, to the very day fixed in the petition, but may introduce evidence to establish ownership prior to the time stated in the pleading. The evidence considered, and found sufficient to sustain the verdict of the jury. *Russell v. Bradley* ..... 438
9. *Negligence — Incompetent Evidence.* Where the negligence alleged was that the defendant company permitted the accumulation of inflammable, combustible and explosive coal dust in the mine, and failed to remove or sprinkle the same, proof that the mine was improperly laid out and constructed, or that proper doors or brattices were not supplied, is incompetent and inadmissible. *Coal Co. v. Wilson* ..... 460
10. *Continuance — Refusal, Error.* There was an agreement between counsel for plaintiff and defendant that the testimony given by certain witnesses in a former case should be transcribed and used as a deposition in the present case, and the party in whose favor the testimony was given relied on the agreement, and did not procure the attendance of the witnesses, but at the trial the testimony of such witnesses, which is material and important, and which, if treated as a deposition taken in this case, would have been competent and admissible, was excluded from consideration upon the objection of the opposing party. The other party then applied for a continuance of the cause on account of the exclusion of the testimony and the inability to otherwise obtain the same, which application was denied. *Held, Error.* Either the testimony should have been received or the continuance granted. The testimony in the case tending to sustain the charge of negligence as made examined, and *held* to be sufficient to take the case to the jury. *Id.* ..... 460
11. *Note — Assignment — Indorsement of Payment — Liability of Maker.* Where C., a stranger to a promissory note, takes the same from H., one of two makers, with an indorsement plainly written thereon: "Paid by H., this September 5, 1882, [which is the date of maturity,] and transferred to C.," "Without recourse, H.," and there is no mistake or fraud in the transaction, H. is relieved from liability on the note to C. or to his assignee. In an action on such a note, so indorsed, and where

**EVIDENCE—CONTINUED:**

there is no fraud or mistake in the transfer, parol proof contradicting the indorsement, or which would change it from a conditional to an unconditional transfer, is not admissible. *Cross v. Hollister*. . . . . 652

12. *Action on Insurance Policy—Evidence for Jury.* In an action upon an insurance policy for loss by fire, where it appeared that an application had been received by the company, and the party making the same had possession of a policy of insurance in the company to which application had been made, and for which a note for the premium had been executed to such company, *held*, that there was evidence sufficient to go to the jury, and that this court cannot say there was a failure of proof showing that the insurer had executed and delivered a policy to the insured. The evidence examined, and found that no prejudicial error was committed by the trial court in the admission of the same. *Insurance Co. v. Laggart*. . . . . 668

13. *Construction of Deed—Agreement to Reconvey.* S. and wife executed an instrument in the form of a warranty deed, for the conveyance of land to B., C., and B. At the time B., C. and B. entered into an agreement with S. and wife to reconvey the land described in said deed to S. and wife at the end of a year, upon the payment by S. and wife of a sum of money therein named to B., C., and B., with a stipulation that S. and wife are to occupy the land in the meantime as tenants of B., C. and B. under the deed. S. and wife did not pay, but surrendered the premises to B., C., and B. *Held*, That in view of the treatment accorded said instruments by the parties, they constituted a deed from S. and wife to B., C., and B., and a contract to reconvey from B., C. and B. to S. and wife, upon the payment of the sum of money named in said contract by S. and wife to B., C., and B. The record in this case examined, and *held*, that it discloses evidence to sustain the finding of the district court, and therefore this court will not reverse the action of said court. *Osborne v. Schoonmaker*. . . . . 667

14. *Condemnation Proceeding—Value of Land Taken—Expert Evidence.* Where farmers or others give their opinions, as experts, as to the market value of land with which they are acquainted, it is not improper, upon cross-examination, for the purpose of testing their knowledge and competency, to inquire of them concerning the sales of adjoining land. *C. K. & N. Rly. Co. v. Stewart*. . . . . 704  
See "CASE-MADE;" "CONVEYANCE," 3; "CRIMINAL LAW," 7, 8, 9, 17, 18, 20; "FINDINGS," 5, 10; "PLEADING AND PRACTICE," 1, 5, 20, 23, 30, 34, 70, 73.

**EXCEPTIONS—SEE "INSTRUCTIONS," 4, 8.**

**EXCESSIVE DAMAGES—SEE "VERDICT," 2.**

**EXCESSIVE VERDICT—SEE "RAILROADS, AND RAILROAD COMPANIES," 10.**

**EXECUTION:**

*Homestead—Sale under Execution—Mechanic's Lien.* In an action upon a promissory note, where the court finds that the debt for which such note was given was for lumber and material furnished by the plaintiff, and used by the defendant in



## EXECUTION—CONTINUED:

the erection of a dwelling-house upon his homestead while he was the owner thereof, such finding is conclusive; and where a judgment for the amount due upon such promissory note is rendered upon such finding, *held*, that, under an execution issued upon such judgment, the officer may, if no personal property of the judgment debtor can be found, levy upon the homestead to satisfy such execution. *Tyler v. Johnson*..... 410

See "INSURANCE," 3.

## EXEMPTION:

*Hotel-Keeper—Omnibus, Exempt.* The 'bus of a hotel-keeper, a resident of Kansas, used in connection with his business in Kansas, and necessary to the successful prosecution of such business, is exempt under subdivision 3 of § 4 of the act relating to exemptions. *White v. Gemeny*..... 741

See "HOMESTEAD," 2, 5.

## EXPERTS—SEE "WITNESS."

## EXPLOSIVE ELEMENT—SEE "COAL DUST."

## F.

## FENCES—SEE "RAILROADS, AND RAILROAD COMPANIES," 8, 12.

## FINDINGS:

1. *Deed—Ratification of Invalid Delivery.* Where the grantee has surreptitiously obtained possession of a deed duly acknowledged, but never lawfully delivered, such possession and invalid delivery may be ratified by the subsequent acts of the grantor, which show a clear recognition and acquiescence in the grantee's title to the land conveyed by such deed. *Held*, That the evidence and special findings of fact in this case show that the grantor ratified the act of the grantee in taking into his possession the deed of June 30, 1876; and that the conclusion of law, as found by the district court, that the grantor did not ratify such possession, is not warranted by the evidence and the special findings of fact. *McNulty v. McNulty*..... 208
2. *Defect of Parties—Waiver.* A defect of parties should be raised either by answer or demurrer, and, when not so taken advantage of, is usually waived. The evidence examined, and found sufficient to support the special findings and judgment of the trial court. *Hurd v. Simpson*..... 245
3. *Judgment, When not Reversed.* Where special findings are immaterial, a judgment will not be reversed, although there may be no evidence to support such findings. *Booge v. Scott*..... 247
4. *Verdict—Harmony.* If the findings of the jury will fairly admit of an interpretation which will make them harmonious with each other and with the general verdict, that interpretation should be given, rather than one which will overturn and destroy the findings and verdict. (Following *Railroad Co. v. Ritz*, 33 Kas. 404.) *Jackson v. Linnington*..... 397
5. *Bank—Transfer to Avoid Taxation—Evidence.* Whether a resolution of the directors of a national bank made on the 28th day of February, declaring a dividend of \$40,000, payable

**FINDINGS—CONTINUED:**

- out of the surplus, to be placed to the credit of stockholders' account, and to remain as a deposit until otherwise ordered, is a mere subterfuge to avoid taxation on the 1st day of March following, or is made in good faith, is a question of fact to be determined by the trial court; and that court having heard the testimony of witnesses and made a finding in favor of the good faith of the transaction, and there being some evidence to support such finding, it will not be disturbed by this court. *Pollard v. National Bank*..... 406
6. *Railroad Company—Negligence—Fire.* In an action against a railway company to recover damages caused by fire escaping on the right-of-way of such company, the fact that the dry grass of the previous season was suffered to remain on the right-of-way is proper evidence for the jury, and they may find negligence from it. Such negligence is ordinarily a question of fact for the jury; and when the fire was caused by the operation of the railroad, and the jury make special findings, *inter alia*, that the negligence of the defendant consisted in the failure to properly clean its right-of-way, *held*, that under chapter 155 of the Laws of 1885 the defendant was not entitled to judgment upon such special findings, when the general verdict was for the plaintiff. *St. L. & S. F. Rly. Co. v. Richardson*..... 517
7. *Instructions—No Error.* The instructions given and the instructions refused examined, and *held*, that the court committed no error in giving or refusing instructions. The evidence examined, and *held* to support the findings of the jury. *Insurance Co. v. Wood*..... 521
8. *Verdict—Inconsistent Findings—New Trial.* The record in this case examined, and *held*, that the special findings of the jury are so inconsistent with each other and with the general verdict, and disclose such a want of intelligence and fairness, that the motion for a new trial should have been sustained by the trial court. *S. K. Rly. Co. v. Gorsuch*..... 588
9. *Homestead—Abandonment—Finding Sustained.* The evidence in the case examined, and *held* to be sufficient to sustain the finding of the trial court, that the land in controversy had been abandoned by both the husband and the wife as a homestead prior to the giving of the mortgage thereon executed by the husband alone. *Bradford v. Loan Co.*..... 587
10. *Disorderly Conduct—Complaint.* A complaint charging that H., on the 6th day of July, 1889, at the city of Topeka, county of Shawnee and state of Kansas, unlawfully and willfully disturbed the peace and quiet of the city of Topeka, by the use of loud, profane and indecent language, states an offense under §22 of ordinance 861 of said city. The evidence examined, and *held* sufficient to support a finding by the jury that the peace of the city was disturbed by the defendant as alleged. *City of Topeka v. Heitman*..... 739
- See "EVIDENCE," 4.

**FORECLOSURE—SEE "MORTGAGE," 1, 3, 5, 6, 9.**

**FORFEITURE OF CHARTER—SEE "INSURANCE," 4.**

**FORGERY—SEE "CRIMINAL LAW," 16, 17; "MORTGAGE," 2, 9.**

**FRACTIONS OF A DAY—SEE "PLEADING AND PRACTICE," 8.**

## FRAUD:

1. *Agreement—Statute of Frauds.* An agreement to render services as a servant girl for another for \$100 per year, the services to commence at the date of such agreement, is not within the statute of frauds, (§ 6, ch. 43, ¶ 3166, Gen. Stat. of 1889,) as the agreement might have been performed within one year. *Atken v. Nogle*..... 96
2. *Payment for Services.* Where services have been actually rendered to another under a verbal agreement, not binding upon the parties on account of the provision of § 6, ch. 43, requiring the agreement to be in writing if not to be performed within one year, the party benefited thereby may be compelled to pay for the same. *Id.*..... 96
3. *Fraudulent Sale—Rights of Bona Fide Purchaser.* Where an insolvent merchant sells his stock of merchandise to defraud his creditors, his vendee, without notice of the fraud at the time of the sale, is protected only to the extent of payments made or security or property appropriated in payment thereof before he obtains knowledge of the fraud of his vendor. *Work v. Coverdale*..... 307
4. *Concealment—Limitation of Action.* The statute of limitations does not begin to run against an action for relief on the ground of fraud until the fraud is discovered by the party aggrieved. But where this exception is relied on, and the plaintiff's petition shows that the fraud was consummated more than two years before the commencement of the action, it is incumbent on him to allege that he did not discover the fraud until within the two-year period of limitation, in order to take it out of the operation of the statute. An allegation that he did not find the whereabouts of the defendant is not equivalent to an averment of a failure to discover the fraud. *Myers v. Center*..... 324
5. "Absconding and concealing," as used in § 21 of the civil code, refers to the acts of the party within this state. (*Hoggett v. Emerson*, 8 Kas. 262; *Frey v. Aultman*, 30 id. 181.) *Id.*..... 324
6. *Statute of Frauds.* Section 6 of the act for the prevention of frauds and perjuries provides that "no action shall be brought whereby to charge a party . . . upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized." *Guthrie v. Anderson*..... 383
7. *Part Performance, Insufficient.* The mere payment of a small part of the purchase-money by an alleged purchaser to the owner thereof is not a sufficient part performance to take the case out of the statute of frauds. *Id.*..... 383
8. *Alleged Purchaser, not Charged.* Although a written memorandum concerning the sale of real estate, signed by the owners thereof, is wholly in the handwriting of an alleged purchaser, and his name is introduced in the body of the instrument as one of the terms or a part thereof, yet if he nowhere signs the same by himself or agent, the memorandum is not sufficient to satisfy the statute of frauds, so that he can be charged thereby. *Id.*..... 383

**FRAUD—CONTINUED:**

9. *Judgment—Vacation for Fraud—Pleading.* Where a judgment obtained against several defendants is sought to be vacated on account of the fraud practiced by the successful party, and it is also alleged that it is void as to some of the defendants because no service of summons was made upon them, those not served are not confined to the remedy prescribed in the last clause of § 575 of the civil code, of having the judgment vacated on motion, but may join with the other defendants in an action to have it set aside for the fraud practiced by those who obtained the same. The allegations of fraud contained in the petition examined, and, although somewhat indefinite, are held to be sufficient to withstand a demurrer filed against the same. *Steele v. Duncan*. . . . . 511
  10. *Chattel Mortgages, When Fraudulent—Retention of Property by Mortgagor.* When, by the terms of two chattel mortgages, no power of sale is given to the mortgagor of certain live stock, but the mortgagor, with the knowledge and acquiescence of the mortgagees, makes sales of portions of the live stock, and buys other live stock and mingles it with the mortgaged stock, makes weekly shipments, and buys and sells and adds to and takes from the live stock originally mortgaged, until, after the lapse of a few months, the identity of the particular livestock mortgaged is lost, and the mortgagor cannot identify it; and the mortgagor uses, controls, buys, and sells, and in all other respects treats the live stock as his own, and as if no mortgage existed, and applies the proceeds of the sales made at his own discretion, and does not render an account to the mortgagees of the amount or disposition of the proceeds of stated sales, such mortgages are, as a matter of law, fraudulent and void as to other creditors of the mortgagor. *Brown v. Barber*. . . . . 527
- See "CONVEYANCE," 3; "PROMISSORY NOTE," 2.

**FRAUDULENT CONVEYANCE—SEE "CHATTEL MORTGAGE," 4.**

G.

**GENERAL DENIAL—SEE "REPLEVIN," 7.**

**GENERAL OBJECTION—SEE "INSTRUCTIONS," 2.**

**GUARDIAN AND WARD:**

1. *Acts, Valid against Collateral Attack.* Where letters of guardianship are issued and recorded in the probate judge's office, and the guardian gives bond and duly qualifies and enters upon the discharge of his duties as guardian with the approval of the probate judge, and all this is of record, the guardian's acts will be held valid when attacked collaterally, although there may not be any further record in the probate judge's office of his appointment. *Houbert v. Heyle*. . . . . 58
2. *Petition, Sufficient against Collateral Attack.* Where a petition by a guardian to sell certain land belonging to his ward states, among other things, that the ward had no money or personal property, and that it was to his interest and necessary for his support and education that the land should be sold, and describes the land as being an undivided one-twelfth interest "in the following-described real estate, to wit, the southeast quarter

## GUARDIAN AND WARD—CONTINUED:

- of section 32, range 17, township 12," without stating specifically in what county or state the land was situated, or whether in range east or west, or township north or south, but land answering to the aforesaid description was in fact situated in Shawnee county, where all the parties interested resided, and where all the proceedings were had, *held*, that the petition must be held to be sufficient when the sale under it is many years afterward attacked collaterally. *Id.*..... 58
3. *Petition, Sufficient against Collateral Attack.* Where the petition and notice for the sale by a guardian of his ward's real estate are each signed by the guardian and served upon the minor by an individual who is not an officer, and the proof of the service is shown by the affidavit of the person who served the same, and all were filed in the probate judge's office, and the probate judge, as well as the district court, found that the service was sufficient, *held*, that the supreme court must also consider it sufficient, and especially so where the service is attacked only in a collateral proceeding. *Id.*..... 58
4. *Valid Sale; Case, Followed.* The failure of a guardian to give security, as required by § 15 of the act relating to guardians and wards, will not render void a sale regularly made and approved. (Following *Watts v. Cook*, 24 Kas. 278.) *Id.*..... 59
5. *Irregularities—Sale and Deed Deemed Valid.* Other irregularities mentioned, and *held* not to invalidate the guardian's sale and deed, when the same are attacked in a collateral proceeding. *Id.*..... 59

## H.

*HABEAS CORPUS*—SEE "PLEADING AND PRACTICE," 22.

*HARMLESS ERROR*—SEE "NEW TRIAL," 1, 4; "PLEADING AND PRACTICE," 5.

*HEARSAY TESTIMONY*—SEE "PLEADING AND PRACTICE," 4.

## HIGHWAY:

1. *Opening, over Mortgaged Land.* For all purposes of establishing and opening highways under our statute through mortgaged premises, the mortgagor in possession is to be regarded as the owner of the land. *Goodrich v. Comm'rs of Atchison Co.*, 355
2. *Establishment—No Notice—Waiver.* Where no notice is given to one of the owners through whose land a public highway is laid out, nor any finding made by the board of county commissioners that the land-owner is a non-resident of the county, the want of jurisdiction by the absence of notice or such a finding is cured by the presentation by him to the board of county commissioners of a claim for damages in consequence of the opening of the road through his land. (*Comm'rs of Woodson Co. v. Heed*, 33 Kas. 34, cited and followed.) *The State v. Hedeem.*..... 402
3. *No Lawful Obstruction, When.* After a public highway has been established and ordered to be opened, and the land-owner presents to the board of county commissioners a claim for damages and compensation on account of the laying out of such

## HIGHWAY—CONTINUED:

road across his land, and the same is allowed, from which no appeal is taken, even if the notice to open the road directed to the land-owner is irregular or defective, but the overseer, after giving a notice, actually proceeds to open the road, the land-owner cannot thereafter lawfully obstruct the same. *Id.*..... 402

4. *Homestead—What Constitutes—Dedication—Estoppel.* The owner of a strip of land whose acts have been such as to estop him from denying that it is a public road, and have induced the public to use it as such, and have caused the officers of the township and the overseer of the road district in which it is situate to work and improve it, is entitled to hold as a homestead a tract of land on both sides of such strip of land consisting of less than 30 acres. *Griswold v. Huffaker*..... 690

## HOMESTEAD:

1. *Sale under Execution—Mechanic's Lien.* In an action upon a promissory note, where the court finds that the debt for which such note was given was for lumber and material furnished by the plaintiff, and used by the defendant in the erection of a dwelling-house upon his homestead while he was the owner thereof, such finding is conclusive; and where a judgment for the amount due upon such promissory note is rendered upon such finding, held, that under an execution issued upon such judgment, the officer may, if no personal property of the judgment debtor can be found, levy upon the homestead to satisfy such execution. *Tyler v. Johnson*..... 410
2. *Extent of Right.* Under the homestead exemption laws of this state, the homestead must consist of one body of land. A person residing upon one 40-acre tract of land and owning a second upon which he does not reside, and which only corners with the first, cannot hold the second 40 exempt as a homestead. *Linn Co. Bank v. Hopkins*..... 580
3. *Abandonment—Finding Sustained.* The evidence in the case examined, and held to be sufficient to sustain the finding of the trial court, that the land in controversy had been abandoned by both the husband and the wife as a homestead prior to the giving of the mortgage thereon executed by the husband alone. *Bradford v. Loan Co.*..... 587
4. *Alienation—Lien—Joint Consent.* Except for taxes, purchase-money, and improvements, no alienation of the homestead of a husband and wife can be effected, nor any lien or incumbrance placed thereon, except by the joint consent of the husband and wife. *Hoffman v. Hill*..... 611
5. *What Constitutes.* And it makes no difference that the homestead, or a part thereof, may be used for some other purpose than as a homestead, where the whole of it constitutes only one tract of land not exceeding in area the amount permitted to be exempted under the homestead exemption laws, and where the part claimed as not a part of the homestead has not been totally abandoned as a part thereof by making it, for instance, another person's homestead or a part thereof, or by using it or permitting it to be used in some other manner inconsistent with the homestead interests of the husband and wife. *Id.*... 611

## HOMESTEAD—CONTINUED:

6. *What Constitutes—Highway—Dedication—Estoppel.* The owner of a strip of land whose acts have been such as to estop him from denying that it is a public road, and have induced the public to use it as such, and have caused the officers of the township and the overseer of the road district in which it is situate to work and improve it, is entitled to hold as a homestead a tract of land on both sides of such strip of land consisting of less than 80 acres. *Griswold v. Huffaker*..... 690
- See "HUSBAND AND WIFE;" "PERSONAL PROPERTY," 2.

## HOMICIDE—SEE "CRIMINAL LAW," 22.

## HOTEL-KEEPER—SEE "EXEMPTION."

## HUSBAND AND WIFE:

1. *Action—Misjoinder—Joint Judgment.* Where a husband and wife sell and convey jointly and by a joint deed certain real estate to H. for the joint consideration of \$5,650, and afterward the grantors commence a joint action against H. for the purchase-price of the land, and the petition states and shows a joint cause of action for the purchase-price of the land, and no question is raised as to a misjoinder of causes of action or of parties by either a demurrer or an answer, but on the trial it appears that each of the plaintiffs owned a separate portion of such real estate, and the trial court rendered a joint judgment in favor of the plaintiffs and against the defendant for the amount of the purchase-price still remaining due and unpaid, held, not error. *Hurd v. Simpson*..... 372
2. *Homestead—Alienation—Lien—Joint Consent.* Except for taxes, purchase-money, and improvements, no alienation of the homestead of a husband and wife can be effected, nor any lien or incumbrance placed thereon, except by the joint consent of the husband and wife. *Hoffman v. Hill*..... 611
3. *Homestead—What Constitutes.* And it makes no difference that the homestead, or a part thereof, may be used for some other purpose than as a homestead, where the whole of it constitutes only one tract of land not exceeding in area the amount permitted to be exempted under the homestead exemption laws, and where the part claimed as not a part of the homestead has not been totally abandoned as a part thereof by making it, for instance, another person's homestead or a part thereof, or by using it or permitting it to be used in some other manner inconsistent with the homestead interests of the husband and wife. *Id.*..... 611
4. *Resulting Trusts—Homestead Purchased with Wife's Funds.* Where a husband and wife reside in another state, and she has a considerable amount of property and he has none, and he is nearly blind, and they agree to come to Kansas and procure land which shall belong to her, and they come and settle upon a quarter-section of government land, intending to procure the title under the United States homestead laws, and the entry thereof is made in his name, but she furnishes all the money to pay the costs and expenses thereof, and to make all the improvements thereon, and valuable improvements are made thereon, and, when final proof is made it is made in his name, but still it is the intention and agreement of the parties that the property shall be hers, and he agrees to convey the title

**HUSBAND AND WIFE—CONTINUED:**

to her as soon as the patent shall be issued, she agreeing to furnish him a home thereon as long as he shall live, and they continue to reside upon the property, and she continues to make improvements thereon, and in a little more than one month after the final proof is made the husband dies intestate, and without executing to his wife any deed for the land, *held*, that under the facts of the case the wife is entitled to the property. *Barlow v. Barlow*..... 676

I.

**IDENTITY OF PROPERTY—SEE "CHATTEL MORTGAGE," 13.**

**ILLEGITIMATE CHILDREN—SEE "BASTARDY."**

**IMMATERIAL EVIDENCE—SEE "EVIDENCE," 3.**

**IMPROVEMENTS—SEE "TAXES, AND TAXATION," 5.**

**INCOMPETENT EVIDENCE—SEE "NEW TRIAL," 1.**

**INDORSEMENT—SEE "PROMISSORY NOTE," 5.**

**INFANT—SEE "PROBATE COURT."**

**INFORMATION—SEE "CRIMINAL LAW," 1, 2, 5, 12, 16, 18.**

**INJUNCTION:**

1. *Trespass on Lands—Injunction, Refused.* When a petition states a cause of action in damages to real estate, and also asks for an injunction to restrain the defendant from trespassing thereon, and the jury find that the defendant had trespassed on plaintiff's land as alleged in the petition, but that he had abandoned his trespasses before suit was begun, and the court refuses to perpetuate the injunction, but renders judgment for the plaintiff for nominal damages and costs, *held*, not error. *Curtis v. Paggett*..... 86
2. *Execution.* Where an execution against an insurance company is directed to the sheriff of another county, who attempts to levy on property which is exempt under chapter 111, Laws of 1875, (Comp. Laws of 1879, ch. 50a,) the company, having its place of business in the same county, may apply to the court of that county to prevent the unlawful sale, and is not obliged to proceed in the court from which the execution issued. *Naill v. Insurance Co*..... 223
3. *County Board—Control of County Printing.* Under ¶ 1655 of the General Statutes of 1889, the boards of county commissioners of the several counties of the state have exclusive control over the county printing; and, in the absence of fraud or collusion, injunction will not lie to restrain the board from paying for such county printing at legal rates, although other parties may have been willing and did offer to do the county printing for a less sum than the amount fixed by law for doing such work. *Comm'rs of Harper Co. v. The State, ex rel*..... 283
4. *County Printing—Setting Aside Contract.* Mere threats by county commissioners to ignore and set aside a contract let by them for the county printing, in the absence of any official



## INJUNCTION—CONTINUED:

offer or attempt to ignore or set aside such contract, do not constitute grounds for an injunction. *Comm'rs of Seward Co. v. Sloufer*..... 287

5. *When*. Some step must be taken by the commissioners as a board toward setting aside the contract before an injunction can issue. *Id.*..... 287

See "BANKS," 2.

## INJURY TO STOCK—SEE "RAILROADS, AND RAILROAD COMPANIES," 1, 28, 29.

## INSTRUCTIONS:

1. *Eminent Domain*. Upon the trial of an appeal from the award of commissioners appointed to condemn a right-of-way for a railroad company along a highway, it is not error for the trial court to instruct the jury that they are not to take into consideration any benefits which might accrue to the plaintiff, by reason of any change in the location of such public highway. *C. K. & W. Rld. Co. v. Woodward*..... 191
2. *Review—General Objection*. A party who complains of the rulings of the court in charging the jury, and who seeks to have them reviewed, should specify in his brief and argument wherein the rulings are erroneous. A mere general objection is insufficient. *Jackson v. Linnington*..... 396
3. *Error*. Where the burden of proof under the pleadings and the law rests upon the defendant, it is material error for the court to instruct the jury otherwise. *Machine Co. v. Morse*... 429
4. *No Exception*. Instructions not excepted to will not be reviewed. *Russell v. Bradley*..... 438
5. *No Error*. The instructions given and the instructions refused examined, and held, that the court committed no error in giving or refusing instructions. The evidence examined, and held to support the findings of the jury. *Insurance Co. v. Wood*... 521
6. *Fire Set by Locomotive—Pleading and Proof*. In an action against a railway company for damages by fire caused by the operation of such railway, under § 1821 of the General Statutes of 1889, it is only necessary to allege and prove that the fire complained of was caused by the operation of the defendant's railway, to make out a *prima facie* case. Instruction given and refused considered, and found that the trial court committed no error. *Ft. S. W. & W. Rly. Co. v. Tubbs*..... 630
7. *When to be Given*. Instructions are not to be given unless applicable to the facts disclosed upon the trial. *C. K. & N. Rly. Co. v. Stewart*..... 704
8. *Exception, General and Indefinite*. The exception to the last instruction given by the court to the jury is too general and indefinite to save any objection to the instruction, except the usual one that it does not correctly state the law of the case. It is not sufficiently specific and certain to save the question whether or not the giving of the instruction after the jury had partially considered the case is error. *City of Topeka v. Heitman*..... 739

See "CRIMINAL LAW," 3, 10; "PLEADING AND PRACTICE," 41, 66.

INSURANCE:

1. *Action on Policy—Evidence and Instructions, not Within Issues.* In an action to recover on a policy of insurance, the plaintiff alleged the contract of insurance, the loss by fire, and the refusal of payment. The insurance company answered that a material condition of the contract had been broken, and that the rights of the assured under the policy had been forfeited. The plaintiff replied by a general denial. On the trial, proof was offered over objection tending to show that the company had waived the condition and was estopped from taking advantage of the forfeiture, and also that since the loss a final compromise and settlement had been agreed upon between the assured and an agent of the company. *Held*, That this evidence and the instructions based thereon were not within the issues and should have been excluded. *Insurance Co. v. Johnson* ..... 1
2. *Mutual Fire Insurance—Assessments—Separate Classes.* Chapter 111, Laws of 1875, (Comp. Laws of 1879, ch. 50a,) provides that the business of each class of a mutual fire insurance company must be conducted separately from the other, and that in no case shall an assessment be made upon the premium notes of one class to pay the losses or expenses of the other. The statute provides also "that the goods, wares, etc., contained in buildings used for merchandise, must be insured in the second, not the first, class." *Held*, That where one insures with knowledge of the above requirements, and the policy shows upon its face that it was issued as "class No. 2," a general judgment rendered on such a policy cannot be enforced against property expressly devoted to the payment of losses on property of the first class, but may, however, be enforced against any other property. *Naill v. Insurance Co.* ..... 228
3. *Execution—Injunction.* Where an execution against an insurance company is directed to the sheriff of another county, who attempts to levy on property which is exempt under chapter 111, Laws of 1875, (Comp. Laws of 1879, ch. 50a,) the company, having its place of business in the same county, may apply to the court of that county to prevent the unlawful sale, and is not obliged to proceed in the court from which the execution issued. *Id.* ..... 228
4. *Insurance Company—Forfeiture of Charter.* The repeal of a statute under which an insurance company is organized, by a subsequent act of the legislature, which declares the charter of such insurance company forfeited unless the company complies with the provisions of the repealing act within a limited time, does not work the cancellation of policies of said company outstanding at the time of the passage of the later act, though the company failed to comply with its provisions and thus forfeited its charter. *Manlove v. Insurance Co.* ..... 309
5. *Policy—Cancellation.* The acts of the insurance company, in deciding to close up its business, and notifying the plaintiffs that the company would not be liable on its policies issued to them, without returning to the plaintiffs the unearned cash premium paid by them to secure said policies, did not operate as a cancellation of said policies. *Id.* ..... 309, 310
6. *Action on Insurance Policy—Evidence for Jury.* In an action upon an insurance policy for loss by fire, where it appeared that an application had been received by the company, and the

## INSURANCE—CONTINUED:

party making the same had possession of a policy of insurance in the company to which application had been made, and for which a note for the premium had been executed to such company, *held*, that there was evidence sufficient to go to the jury, and that this court cannot say there was a failure of proof showing that the insurer had executed and delivered a policy to the insured. The evidence examined, and found that no prejudicial error was committed by the trial court in the admission of the same. *Insurance Co. v. Laggart*. . . . . 663

See "CONSTITUTIONAL LAW," 2.

INTEREST—SEE "TAXES, AND TAXATION," 1.

INTOXICATING LIQUOR—SEE "CRIMINAL LAW," 5, 18, 19, 20, 23.

## J.

JOINDER OF COUNTS—SEE "CRIMINAL LAW," 5.

JOINT CONSENT—SEE "HOMESTEAD," 4.

JOINT JUDGMENT—SEE "JUDGMENT," 8.

JUDICIAL NOTICE—SEE "COAL DUST," 1; "PLEADING AND PRACTICE," 44.

## JUDGMENT:

1. *When not Vacated.* A defendant in an action to foreclose liens of material-men and mechanics, who is personally served with summons, and allows judgment to go against him by default, is not entitled, nearly six months thereafter, and at a subsequent term of the court, and after the property has been sold at sheriff's sale, to have the judgments vacated on motion or petition, without showing that he has a defense to the whole or a part of the action in which the judgments are rendered. *Coffey v. Carter*. . . . . 22
2. *Case, Followed.* The rule stated in *The State ex rel. v. Stock*, 38 Kas. 154, as to private judgments having no binding force where the state is attempting to enforce its laws, followed. *The State ex rel. v. Burton*. . . . . 44
3. *Nature of Action—Statement in Affidavit.* In an action to foreclose a mortgage based on service by publication only, the affidavit to obtain the same alleged that personal service could not be made upon the defendant within the state, and "that this is an action brought for the recovery of real property under a mortgage, situated in said county of Lyon," and it was contended that the affidavit did not sufficiently state the nature of the action. *Held*, That it is imperfect in this respect, but not so defective as to render a judgment based thereon null and void or subject to a collateral attack. *Shippen v. Kimball*. . . . 173
4. *Mutual Fire Insurance—Assessments—Separate Classes.* Chapter 111, Laws of 1876, (Comp. Laws of 1879, ch. 50a,) provides that the business of each class of a mutual fire insurance company must be conducted separately from the other, and that in no case shall an assessment be made upon the premium notes of one class to pay the losses or expenses of the other.

## JUDGMENT—CONTINUED:

- The statute provides also "that the goods, wares, etc., contained in buildings used for merchandise, must be insured in the second, not the first, class." *Held*, That where one insures with knowledge of the above requirements, and the policy shows upon its face that it was issued as "class No. 2," a general judgment rendered on such a policy cannot be enforced against property expressly devoted to the payment of losses on property of the first class, but may, however, be enforced against any other property. *Naill v. Insurance Co.*..... 223
5. *Findings—Judgment, When not Reversed.* Where special findings are immaterial, a judgment will not be reversed, although there may be no evidence to support such findings. *Booge v. Scott.*..... 247
6. *Amendment in Supreme Court.* Where a trial court renders a judgment for a less amount than the verdict returned by the jury, such judgment cannot be corrected in the supreme court to conform to the verdict of the jury, in proceedings in error brought by the party against whom the judgment is rendered, when no cross-petition is filed by the party in whose favor the verdict is returned, asking for a correction or modification of the judgment. *Mo. Pac. Rly. Co. v. Lea.*..... 268
7. *Mortgage—Foreclosure—Personal Judgment.* Where an action is brought for the foreclosure of a real-estate mortgage and a personal judgment upon the notes secured thereby against the purchaser of the mortgaged premises, who has assumed the payment of the notes secured by the mortgage, and the makers of the notes and mortgage, the failure to indorse the summons, as in an action for the recovery of money only, will not render the personal judgment against such purchaser, or the makers of the notes and mortgage, void. *Beverly v. Fairchild,* 289
8. *Husband and Wife—Action—Misjoinder—Joint Judgment.* Where a husband and wife sell and convey jointly and by a joint deed certain real estate to H. for the joint consideration of \$5,650, and afterward the grantors commence a joint action against H. for the purchase-price of the land, and the petition states and shows a joint cause of action for the purchase-price of the land, and no question is raised as to a misjoinder of causes of action or of parties by either a demurrer or an answer, but on the trial it appears that each of the plaintiffs owned a separate portion of such real estate, and the trial court rendered a joint judgment in favor of the plaintiffs and against the defendant for the amount of the purchase-price still remaining due and unpaid, *held*, not error. *Hurd v. Simpson.*..... 372
9. *No Legal Existence.* Under the allegations of the pleadings, it is assumed by the supreme court that a certain judgment of a justice of the peace was rendered on April 30, 1887, and set aside and a new trial granted on May 4, 1887, and the new trial was set for May 16, 1887; and upon these facts, *held*, that after May 4, 1887, the judgment of the justice of the peace had no legal existence. *Olson v. Nunnally.*..... 391
10. *Mortgage—Foreclosure—Personal Judgment against Intermediate Grantees.* Where lands previously mortgaged were conveyed to R., who assumed and agreed to pay such mortgages, and R. conveyed the land to N. by warranty deed, and N. sub-

## JUDGMENT—CONTINUED:

- sequently mortgaged to the same parties that held the first mortgages, and these parties commenced their action to foreclose, a personal judgment should be rendered against R. for the amount of the mortgages he assumed to pay, both for the protection of the original mortgagor, who conveyed to R., and for the protection of N., to whom R. conveyed by warranty deed, and the amount collected on said judgment should be applied to the satisfaction of the mortgages that R. agreed to pay. *Barb Wire Co. v. Randolph*..... 420
11. *Trial—Admissions—Direction of Judgment.* The court is warranted in acting upon the admissions made by parties during the trial of a cause; and where the plaintiff, in making the opening statement of his case to the court and jury, admits or states facts the existence of which absolutely precludes a recovery by him, the court may close the trial at once and give judgment against him. *Lindley v. A. T. & S. F. Rld. Co.*..... 432
12. *Vacation for Fraud—Pleading.* Where a judgment obtained against several defendants is sought to be vacated on account of the fraud practiced by the successful party, and it is also alleged that it is void as to some of the defendants because no service of summons was made upon them, those not served are not confined to the remedy prescribed in the last clause of § 575 of the civil code, of having the judgment vacated on motion, but may join with the other defendants in an action to have it set aside for the fraud practiced by those who obtained the same. The allegations of fraud contained in the petition examined, and, although somewhat indefinite, are *held* to be sufficient to withstand a demurrer filed against the same. *Steele v. Duncan*..... 511

## JURISDICTION:

1. *Receiver—Appointment, When Void.* A court or a judge at chambers has no power or jurisdiction to appoint a receiver when there is no action then pending. *Guy v. Doak*..... 236
2. *Infant—Adoption—Res Judicata.* An order of the probate court permitting the adoption of an infant child is conclusive so far as that court is concerned. Such court has no further jurisdiction in the matter. The evidence in this case examined, and *held* not to justify this court in depriving the respondents of the custody of the child sought to be taken from them. *In re Bush, Petitioner*..... 264
3. *Appeal from a Justice—New Petition—Practice.* Where an action is appealed from a justice of the peace to the district court, and the plaintiff, with the consent of the defendant, files in the district court a new petition, setting up a claim exceeding \$300, and the defendant voluntarily appears and files his answer thereto, the district court has jurisdiction to hear and determine the action upon the pleadings filed in that court, the same as if there had been no appeal. *Mo. Pac. Rly. Co. v. Lea*..... 268
- See "JUSTICES, AND JUSTICES' COURTS," 7, 12; "PRACTICE, DISTRICT COURT," 8, 12."

## JURY:

1. *Intoxicating Liquor—Unlawful Sale—Competent Juror.* In a criminal prosecution, where the defendant was charged with keeping and maintaining a nuisance, to wit, a place for the sale

**JURY—CONTINUED:**

- of intoxicating liquors, a person who was called as a juror was shown by his own testimony to be a member of an organization called the "Good Templars," whose object was as follows: "He did not understand the special object of such organization to be the enforcement of said [prohibitory liquor] law among others, but to promote temperance among its members by moral suasion." *Held*, That such person was not shown by the foregoing to be incompetent to serve as a juror in the case. And in such a case it is not error for the trial court to permit the prosecution to introduce evidence of other sales of intoxicating liquors than those of which the county attorney or the prosecuting witness had knowledge prior to the commencement of the prosecution. *The State v. Estlinbaum*..... 291, 292
2. *Master and Servant—Death by Wrongful Act—Action by Parents—Excessive Verdict*. In an action brought for the benefit of the parents, as next of kin, to recover for the alleged negligent killing of their son, who was grown up, of full age, and living apart from them, but was unmarried, no proof was offered of the parents' financial condition, or that they had ever received any actual pecuniary benefits from the son during his life-time; nor was there any evidence showing a reasonable probability of pecuniary advantage to them from the continuance of the son's life. *Held*, That a verdict awarding them \$1,500 as damages was excessive, and that under such evidence no more than nominal damages were recoverable. The evidence of negligence produced upon the trial examined, and *held* to be sufficient to warrant the court in submitting the case to the jury. *Coal Co. v. Limb*..... 469
3. *Special Questions—Refusal, Error*. When a party to an action in a proper manner requests the court to submit to the jury proper special interrogatories to be answered by the jury, the court commits error if it refuses to so submit them. *Jones v. Annis*..... 479
4. *Taking Books to Jury-Room*. Whether the jury should be allowed to take to their room when they retire for consultation the account-books of a partnership, is a question resting largely in the discretion of the trial court, and to reverse a judgment for that reason it must affirmatively appear that such discretion has been abused. *Wood v. Wood*..... 617  
See "CRIMINAL LAW," 4, 20; "EVIDENCE," 5, 12.

**JURY TRIAL—SEE "PLEADING AND PRACTICE," 52.**

**JUSTICES, AND JUSTICES' COURTS:**

1. *Continuance*. Paragraph 4931 of the General Statutes of 1889 secures to either party to a cause the right to a continuance for any number of days not exceeding 15, upon filing with the justice the affidavit required thereby. *Cook v. Larson*..... 70
2. *New Trial—No Motion—Review*. Where, in a justice's court, an application for a continuance has been made, and refused by the court, the alleged error growing out of such refusal may be reviewed in this court without any motion for a new trial. *Id*..... 70
3. *Bill of Particulars, Sufficient*. The bill of particulars in this case sufficiently states a cause of action for the recovery of a

## JUSTICES, AND JUSTICES' COURTS—CONTINUED:

- balance due on the transaction therein set out. *Griffin v. O'Neil* ..... 116
4. *Demurrer—Evidence.* The demurrer to the evidence of the plaintiff was properly overruled. Such evidence held sufficient to support the verdict and judgment therein. *Id.* ..... 116
5. *New Trial.* Defendant not entitled to new trial on the ground of accident. *Id.* ..... 116
6. *Judgment—No Legal Existence.* Under the allegations of the pleadings, it is assumed by the supreme court that a certain judgment of a justice of the peace was rendered on April 30, 1887, and set aside and a new trial granted on May 4, 1887, and the new trial was set for May 16, 1887; and upon these facts, held, that after May 4, 1887, the judgment of the justice of the peace had no legal existence. *Olson v. Nunnally* ..... 391
7. *Jurisdiction.* On May 16, 1887, the parties appeared, but the justice of the peace was absent from his office and from the township, and nothing was then done in the case. Held, That the justice of the peace thereby lost all jurisdiction of the case. *Id.* ..... 391
8. *Defunct Judgment, not Revived.* Afterward, and on November 3, 1887, the justice of the peace attempted by an order to set aside and vacate his previous order setting aside and vacating the judgment and granting a new trial; but held, that the order of November 3, 1887, could not have the effect to revive or resuscitate the former defunct judgment. *Id.* ..... 391
9. *Void Execution—Collateral Attack.* Afterward an execution was issued upon the judgment and levied upon the defendant's property; but held, that as the judgment had no legal existence the execution was itself void, and could be attacked collaterally as well as directly, and its enforcement be restrained by injunction. *Id.* ..... 392
10. *No Estoppel.* The defendant in the execution gave a redelivery bond and was thereby permitted to retain the possession of the property; but held, that by giving such redelivery bond he did not estop himself from afterward asserting, either directly or collaterally, that the judgment and all things depending upon it were absolutely void. *Id.* ..... 392
11. *Mandamus to Justice—Approval of Appeal Bond.* Where an appeal bond is tendered to a justice of the peace without any justification by the sureties thereon, and the justice is unacquainted with them or with their qualifications and objects to their sufficiency, it is the duty of the party presenting the bond to satisfy the justice by affidavit or other proof of their qualifications; and when this is not done, and the bond is not approved, the justice will not be compelled by *mandamus* to approve the bond after the expiration of the time for appeal, although it then appears that the sureties first offered possessed the requisite statutory qualifications. *C. K. & N. Rly. Co. v. Marshall* ..... 614
12. *Jurisdiction—Objections Too Late.* In an action commenced and tried before a justice of the peace, then appealed and tried in the district court, it is too late to raise a question of jurisdic-

JUSTICES, AND JUSTICES' COURTS—CONTINUED:

tion in this court, based upon a construction of the pleadings different from that on which the case was tried in the courts below. *Wood v. Wood*..... 617

13. *Practice*. The plaintiff commenced an action before a justice of the peace upon an account duly verified under § 84 of the justices' act, and no denial of the account, verified by affidavit or otherwise, was ever interposed. The justice, in the absence of the plaintiff, sustained a motion of the defendants to dismiss the action for want of prosecution, but within five minutes thereafter and before he entered the order of dismissal upon his docket, set aside the order of dismissal and overruled the defendants' motion, and set the case down for trial at a later hour of the same day, and the defendants' attorney had full notice thereof, and the justice afterward rendered judgment in favor of the plaintiff and against the defendants for the amount of the plaintiff's account. *Held*, No material error was committed as against the defendants. *Sullivan v. Brown*... 708

L.

LAND GRANT—SEE "RAILROADS, AND RAILROAD COMPANIES," 6.

LANDLORD AND TENANT:

*Estoppel*. A landlord who, having leased a portion of a building to H., and who informs W., occupying the balance of the building under a lease which is about to expire, that he has leased the whole building to H. from the expiration of his (W.'s) lease, with authority on the part of H. to sub-let, and advises W. to lease of H., and W. leases of H., is estopped from denying the authority of H. to sub-let to W. And the privies of said landlord taking under him by a subsequent lease are also estopped. The evidence examined, and *held* not to establish any cause of action in favor of the plaintiff below, and that the court erred in overruling the demurrer thereto. *Hill v. Wand*..... 840

LAND WARRANT:

*Location—Demand—Limitation of Action*. In 1859, T. received from W. three land warrants, calling, in the aggregate, for 320 acres of land, and \$180 in cash, to be used by T. in locating land in Kansas, for the benefit of W., with the understanding that, if W. should not be satisfied with the selections of T., that T. would pay W. back his money and the value of the land warrants, at \$1 per acre, with interest at 10 per cent. T. used the warrants and money received from W. in locating land, but took the land in his own name. In September, 1885, W. elected to take the land, and demanded deeds for the same, and also demanded a settlement with T. *Held*, That the statute of limitations did not commence to run until such election and demand were made on T. by W., and that the action was not barred when the suit was commenced. *Tipton v. Warner*..... 606

LARCENY—SEE "CRIMINAL LAW," 6.

LEASE—SEE "LANDLORD AND TENANT."



## LIEN:

*Homestead—Sale under Execution—Mechanic's Lien.* In an action upon a promissory note, where the court finds that the debt for which such note was given was for lumber and material furnished by the plaintiff, and used by the defendant in the erection of a dwelling-house upon his homestead while he was the owner thereof, such finding is conclusive; and where a judgment for the amount due upon such promissory note is rendered upon such finding, *held*, that, under an execution issued upon such judgment, the officer may, if no personal property of the judgment debtor can be found, levy upon the homestead to satisfy such execution. *Tyler v. Johnson*..... 410

See "CHATTEL MORTGAGE," 1, 11, 14; "HOMESTEAD," 1, 4.

## LIMITATION OF ACTIONS:

1. *Ejectment—Action, Barred.* Where a person has been in the actual and exclusive possession of real estate, claiming to be the owner thereof under a guardian's sale and deed, for more than 15 years, and the minor whose land was sold and conveyed, and who is a female, attained her majority in the meantime by arriving at the age of 18 years, and also in the meantime permitted more than two years after attaining her majority to elapse before she commenced any action to disturb the possession of the person holding under the guardian's sale and deed or to question his ownership with regard to the land, *held*, that any cause of action which she might have had because of such adverse possession and claim of ownership is barred by the 15-years' statute of limitations. (Civil Code, § 16, subdiv. 4.) *Howbert v. Heyle*..... 58
2. *Fraud—Concealment.* The statute of limitations does not begin to run against an action for relief on the ground of fraud until the fraud is discovered by the party aggrieved. But where this exception is relied on, and the plaintiff's petition shows that the fraud was consummated more than two years before the commencement of the action, it is incumbent on him to allege that he did not discover the fraud until within the two-year period of limitation, in order to take it out of the operation of the statute. An allegation that he did not find the whereabouts of the defendant is not equivalent to an averment of a failure to discover the fraud. *Myers v. Center*..... 324
3. *Land Warrants—Location—Demand.* In 1859, T. received from W. three land warrants, calling, in the aggregate, for 320 acres of land, and \$180 in cash, to be used by T. in locating land in Kansas, for the benefit of W., with the understanding that, if W. should not be satisfied with the selections of T., that T. would pay W. back his money and the value of the land warrants, at \$1 per acre, with interest at 10 per cent. T. used the warrants and money received from W. in locating land, but took the land in his own name. In September, 1885, W. elected to take the land, and demanded deeds for the same, and also demanded a settlement with T. *Held*, That the statute of limitations did not commence to run until such election and demand were made on T. by W., and that the action was not barred when the suit was commenced. *Tipton v. Warner*..... 606
4. *Action, not Barred.* The action was brought within proper time so as not to be barred by any statute of limitations, but the amendment was not made until more than three years had

**LIMITATION OF ACTIONS—CONTINUED:**

elapsed after the purchase and sale of the horse, and the plaintiffs recovered in the action. *Held*, That the cause of action upon which the plaintiffs recovered was not barred by any statute of limitations. *Culp v. Steere*. . . . . 747

**LIQUIDATED DAMAGES—SEE "DAMAGES," 7.**

**LIVE-STOCK SHIPMENTS—SEE "RAILROADS, AND RAILROAD COMPANIES," 28.**

**LOCATION OF ROUTE—SEE "RAILROADS, AND RAILROAD COMPANIES," 6.**

**M.**

**MALICIOUS PROSECUTION:**

1. *Probable Cause—Liability.* In an action for malicious prosecution upon a charge of malicious trespass, where there was probable cause for commencing the prosecution, and where the defendant, acting upon the advice of attorneys, and believing there was probable cause, in good faith and without malice caused the arrest of the plaintiff, the defendant is not liable to the plaintiff, although one of his purposes was to prevent the construction of a building upon his land. *Jackson v. Linnington* . . . . . 396

2. *Costs in Criminal Cases—Liability of Complaining Witness—Constitutional Law.* Section 326 of the criminal code, which provides that a prosecuting witness may be committed for his failure to pay costs when the jury find the defendant not guilty, and also find that the prosecution was instituted from malicious motives and without probable cause, is not unconstitutional. (*In re Ebenhack*, 17 Kas. 618, followed.) *In re Lowe, Appellant*. . . . . 769

**MANDAMUS:**

*County Board—Recognition of Member.* *Mandamus* will not lie to compel one of the members of a board of county commissioners and the county clerk to recognize a person as county commissioner who has had a judgment rendered against him in a contest proceeding, instituted to determine who was elected to such office, and who has also been ousted from the office by a judgment of the district court in proceedings in *quo warranto*. The peremptory writ of *mandamus* should not issue unless there is a clear and specific legal right to be enforced, and there is no other particular and adequate legal remedy. *Swartz v. Large*, 304

See "JUSTICES, AND JUSTICES' COURTS," 11; "PRACTICE, SUPREME COURT," 18.

**MASTER AND SERVANT—SEE "DAMAGES," 8, 9; "RAILROADS, AND RAILROAD COMPANIES," 11.**

**MEASURE OF DAMAGES—SEE "RAILROADS, AND RAILROAD COMPANIES," 17.**

**MEASURE OF RECOVERY—SEE "REPLEVIN," 4, 6.**

## MECHANICS' LIENS:

1. *Action by Subcontractors—Parties—Counterclaim by Owner.* Under ¶ 4738, (mechanics' liens,) General Statutes of 1889, a subcontractor or other person who brings an action against the owner of a building for materials used in its construction must make the original contractor a party, and if the subcontractor or other person fails or refuses to do so, and the contractor has notice or knowledge of the pendency of the action and fails to defend the maker against such demand, the owner may defend at the cost and expense of the contractor. If the contractor is not shown to have notice or knowledge of the pendency of the action, the owner has a cause of action against the subcontractor or other person for damages by reason of the wrongful institution of the action, because of the failure to make the contractor a party. When the contractor assigns all the money due on a building contract to a lumberman who had furnished material, and who had primarily brought suit without making the contractor a party, the owner can plead such cause of action as a counterclaim. *Tracy v. Kerr*..... 656
2. *Cross Petition—Answer—Amendment of Cross-Petition—Practice.* Where a cross-petition sets up a mechanic's lien, and prays for a foreclosure of the same and a sale of the premises therein described, and an answer is filed containing, among other things, a general denial, and upon the trial the court permits the answer to be amended so as to allege the abandonment of work upon the building in the place of its completion, the answer on file will be regarded as putting in issue the amendment to the cross-petition; and therefore, when the court and parties proceed with the trial as if the alleged abandonment was one of the issues of the case, the failure of the court to permit the filing of a new denial is not erroneous or prejudicial. *Springs Co. v. Lumber Co.*..... 672
3. *Timely Filing—Enforcement.* Where the foreclosure of a mechanic's lien is tried before the court without a jury, and the court finds as a fact that certain work was done upon the building upon a specific date, it will be assumed, in the absence of any showing to the contrary, that the work was done under the contract, or with the consent of the owner. In either case, the owner would be liable for the work done and material furnished, and the mechanic's lien, if filed within the statutory time after such work was done and material furnished, would be in time. (The case of *Shaw v. Stewart*, 48 Kas. 572, followed.) *Id.*, 672  
See "LIEN."

MEMORANDUM—SEE "ACTION," 10.

MERGER—SEE "ACTION," 12.

MISJOINDER—SEE "PLEADING AND PRACTICE," 36.

## MORTGAGE:

1. *Foreclosure—Parties—Judicial Sales, not Void.* Wells entered a tract of public land at the United States land office, and obtained a certificate of entry, and immediately thereafter, and before the patent was issued, gave a mortgage thereon to Walker, to secure the purchase-money which was furnished by Walker, which mortgage was at once placed upon record. Shortly afterward Wells conveyed his interest in the land to

**MORTGAGE—CONTINUED:**

C., by an assignment of the certificate of purchase, but this assignment was never recorded nor brought to the notice of the mortgagee. Later, default was made in the payment of the debt secured by the mortgage, and Walker brought an action against Wells, the mortgagor, to foreclose, but obtained only constructive service upon him, and, not knowing that C. was the assignee of the mortgagor, he was not made a party to the proceeding. A decree of foreclosure was rendered, and the land sold thereunder to Walker, which sale was confirmed by the court, and a proper sheriff's deed was executed to Walker for the land. Afterward, in pursuance of a judgment rendered against Walker, and a judicial sale on said judgment, the sheriff duly executed and delivered to K. a sheriff's deed, which conveyed the entire interest of Walker in the land, thus giving to K., through the foreclosure of the mortgage, the judgments, and the judicial sales, a clear chain of title from Wells, the common source of title, before C., who also claims under Wells, had any title or claim whatever on record. Up to this time the land was vacant, unoccupied, and unimproved, and the patent for the same had not been issued. Afterward the patent from the United States was issued directly to C., as the assignee of Wells. *Held*, That as C. had no title of record, the failure to make him a party to the foreclosure proceedings did not render the judicial sales and the purchases by Walker and K. void; and *further held*, that the equities and interest of the purchasers at such sales are superior and paramount to those of C. *Shippen v. Kimball*..... 173

2. *Evidence—Comparison of Signatures.* Where, in a criminal case, a defendant is charged with the forgery of a note and mortgage, and the state and the defendant both prove upon the trial that a former mortgage offered in evidence was signed by the party whose signature is charged to have been forged, such former mortgage is competent evidence to be examined by the jury for the purpose of comparing the genuine signature upon the former mortgage with those disputed and denied, to assist in determining whether the latter were genuine. *The State v. Zimmerman*..... 242

3. *Foreclosure—Personal Judgment.* Where an action is brought for the foreclosure of a real-estate mortgage and a personal judgment upon the notes secured thereby against the purchaser of the mortgaged premises, who has assumed the payment of the notes secured by the mortgage, and the makers of the notes and mortgage, the failure to indorse the summons, as in an action for the recovery of money only, will not render the personal judgment against such purchaser, or the makers of the notes and mortgage, void. *Beverly v. Fairchild*..... 289

4. *Highway—Opening over Mortgaged Land.* For all purposes of establishing and opening highways under our statutes through mortgaged premises, the mortgagor in possession is to be regarded as the owner of the land. *Goodrich v. Comm'rs of Atchison Co.*..... 375

5. *Foreclosure—Personal Judgment against Intermediate Grantees.* Where lands previously mortgaged were conveyed to R., who assumed and agreed to pay such mortgages, and R. conveyed the land to N. by warranty deed, and N. subsequently mortgaged to the same parties that held the first mortgages, and

## MORTGAGE—CONTINUED:

- these parties commenced their action to foreclose, a personal judgment should be rendered against R. for the amount of the mortgages he assumed to pay, both for the protection of the original mortgagor, who conveyed to R., and for the protection of N., to whom R. conveyed by warranty deed, and the amount collected on said judgment should be applied to the satisfaction of the mortgages that R. agreed to pay. *Barb Wire Co. v. Randolph*..... 420
6. *Foreclosure—Jury Trial.* In an action to foreclose a mortgage, a surety on the note secured filed an answer that did not state a defense to the action, and demanded a jury trial. *Held*, It was not error in the trial court to refuse a jury trial. *Good-acre v. Skinner*..... 575
7. *Assignment—Preference of Creditors.* Where a deed of assignment and certain mortgages were in contemplation at the same time, and the preparation of all commenced and proceeded together, and all were executed and completed substantially at the same time, the preparation and execution of all must be treated as a simultaneous, continuous and single act, and no preference can be rightfully claimed under the mortgages. (*Hardware Co. v. Implement Co.*, ante, p. 423, followed.) *Watkins National Bank v. Sands*..... 591
8. *Not Defeated—Good Faith.* In the deed of assignment the conveyance was made in general terms, descriptive of all the property of the debtor not exempt by law, and it also contained a provision for the *pro rata* distribution of the proceeds among all the creditors; and it further provided that the conveyance was made subject to the mortgages executed contemporaneously with the deed of assignment. *Held*, That the assignment, having been made in good faith, and in terms so as to convey all the property of the assignor for the benefit of all his creditors, the reference to the mortgages, although inoperative and void, is not of itself sufficient to defeat the assignment. The testimony examined, and found to be sufficient to sustain the ruling of the court in vacating and discharging an attachment. *Id.*..... 591
9. *Ejectment—Foreclosure—Forgery—Evidence.* In an action of ejectment brought against the grantee of a purchaser at a judicial sale made in an action of foreclosure, it is competent for the plaintiffs in the ejectment action to show that the mortgage was a forgery, and that the persons purporting to have executed the same were not served by process in the foreclosure suit. *Pray v. Jenkins*..... 599
10. *Sale of Land—Defective Title—Recovery by Vendee of Money Paid.* Where K. sells to B. certain blocks of land, and gives B. a title bond, in which he agrees, upon payment of the purchase-money by B., to execute and deliver to B. a deed conveying an indefeasible estate in fee-simple, B. may refuse to accept a deed for said blocks of land upon the discovery of a cloud on the title in the form of an unsatisfied mortgage of record; and unless K., within a reasonable time after demand, pays such mortgage, or procures a release of the same, B. may bring suit to recover back the money paid on such contract. *Kimball v. Bell*..... 757

## MORTGAGE—CONTINUED:

11. *Evidence*. In an action to recover the purchase-money, B. is not required to go behind the record and show that, in fact, the mortgage has not been paid. It is sufficient if he show the mortgage of record and unsatisfied. *Id.* ..... 757
12. *Demurrer to Evidence*. Having made such showing, a demurrer to the evidence will not lie upon the ground that he failed to show the mortgage had not in fact been paid. *Id.* ..... 757

## MURDER—SEE "CRIMINAL LAW," 12, 22.

## N.

## NEGLIGENCE:

1. *Railroad Company—Fire—Findings*. In an action against a railway company to recover damages caused by fire escaping on the right-of-way of such company, the fact that the dry grass of the previous season was suffered to remain on the right-of-way is proper evidence for the jury, and they may find negligence from it. Such negligence is ordinarily a question of fact for the jury; and when the fire was caused by the operation of the railroad, and the jury make special findings, *inter alia*, that the negligence of the defendant consisted in the failure to properly clean its right-of-way, *held*, that under chapter 155 of the Laws of 1885 the defendant was not entitled to judgment upon such special findings, when the general verdict was for the plaintiff. *St. L. & S. F. Rly. Co. v. Richardson* ..... 517
2. *Railroad Company—No Cattle-Guards*. The defendant railway company failed and neglected to construct or maintain cattle-guards where its line of railroad entered and left an inclosed pasture. During the time of such neglect, the owner of the pasture attempted to keep his stock from straying by herding the same. One day the herder left the stock to go to dinner. While absent, a cow strayed away, got into a creek, and mired down. *Held*, If the creek was at a great distance from the pasture, or if the miring of the cow was something extraordinary and not to be expected, and it could not be said that the neglect of the railway company was the proximate cause of the loss of the cow, the company would not be liable therefor. *C. K. & N. Rly. Co. v. Hotz* ..... 627
3. *Contributory Negligence*. In an action under ¶ 1821 of the General Statutes, the plaintiff is not chargeable with contributory negligence for a mere failure to take precautions against the negligence of the defendant. *Ft. S. W. & W. Rly. Co. v. Tubbs*, 680  
See "COAL DUST;" "DAMAGES," 4, 5, 6, 8, 9; "RAILROADS, AND RAILROAD COMPANIES," 2, 3, 15, 19, 21, 22.

## NEW TRIAL:

1. *Incompetent Evidence—Harmless Error*. The admission of incompetent evidence, which is not prejudicial, is not sufficient ground to set aside a judgment and grant a new trial. *A. T. & S. F. Rld. Co. v. Collins* ..... 11
2. *No Motion—Review*. Where, in a justice's court, an application for a continuance has been made, and refused by the court, the alleged error growing out of such refusal may be reviewed in this court without any motion for a new trial. *Cook v. Larson* ..... 70

## NEW TRIAL—CONTINUED:

3. *Oral Statements by Court to Jury—New Trial Denied.* The mere fact that the court made certain oral statements to the jury in relation to their agreeing upon a verdict, after they had retired to consider their verdict and had been returned into court, but did not direct them upon any rule of law involved in the trial, or make any comment upon the testimony, is not such an instruction as is required to be in writing, in accordance with § 286 of the criminal code; and while such statements may be subject to criticism, and ought not to have been made to the jury, still they are not considered sufficiently prejudicial to grant a new trial in a case where, from the entire record, the guilt of the defendant clearly appears. *The State v. McLafferty*..... 140
4. *Harmless Error.* The introduction of immaterial evidence, which is not prejudicial to the rights of the defendant, is not sufficient ground to grant a new trial. *C. K. & W. Rld. Co. v. Woodward*..... 191
5. *Application.* Where an application by petition is filed for a new trial, under the provisions of § 810 of the civil code, no verification thereof is required. *Moody v. Branham*..... 314
6. *"Thereupon"—Meaning.* "Thereupon the defendants filed in writing their motion for a new trial." The word "thereupon" in this sentence, which appears in the record immediately after the verdict of the jury, construed as an adverb of time, and held to mean, "without delay or lapse of time." *Hill v. Wand*, 340
7. *Time of Filing Motion—Presumption.* Where an entry of the proceedings taken in a case shows when the trial was begun, but does not affirmatively show when the final decision was made, and it is shown that a motion for a new trial was filed five days after the trial was commenced, which motion was entered and allowed, it will be presumed by the supreme court, for the purpose of upholding the judgment of the court below in granting a new trial, that the motion was filed within three days after the final decision was made. *W. & W. Rld. Co. v. Johnson*..... 351
8. *Motions Overruled—No Review, When.* When errors complained of relate to matters occurring on the trial, for which a new trial is asked, but the action of the court in overruling the motion for a new trial is not assigned as error, they cannot be considered in this court. (*Struthers v. Fuller*, 45 Kas. 735, cited and followed.) *Dryden v. C. K. & N. Rly. Co.*..... 445
9. *Trial—Errors, When Considered.* Errors occurring during the trial cannot be considered by the supreme court unless a motion for a new trial, founded upon and including such errors, has been made by the complaining party, and acted upon by the trial court, and its ruling excepted to, and afterward assigned for error in the supreme court. *Cogshall v. Spurry*.... 448
10. *Verdict—Inconsistent Findings.* The record in this case examined, and held, that the special findings of the jury are so inconsistent with each other and with the general verdict, and disclose such a want of intelligence and fairness, that the motion for a new trial should have been sustained by the trial court. *S. K. Rly. Co. v. Gorsuch*..... 583

## NEW TRIAL—CONTINUED:

11. *Errors of Law—Waiver.* Errors of law occurring at the trial must be assigned for cause in a motion for a new trial, and if this is not done this court will not pass upon them. *The State v. Tuchman*..... 726
12. *Amendment of Motion.* The defendant filed his motion for a new trial within proper time; but more than three days thereafter, and indeed nearly two months thereafter, he asked leave of the court to amend his motion for a new trial by adding thereto the following, to wit: "Errors of law occurring at the trial and excepted to by the defendant," which leave was refused by the court. *Held*, Not error. *Culp v. Steere*..... 747  
See "JUSTICES, AND JUSTICES' COURTS," 2, 5.

NOMINAL DAMAGES—SEE "DAMAGES," 2.

NORMAL SCHOOL FUND—SEE "STATE TREASURY."

NOTICE—SEE "ACTION," 18; "ATTACHMENT," 8; "CONTRACT," 25; "CONVEYANCE," 1; "FRAUD," 8; "HIGHWAY," 2.

NUISANCE—SEE "CRIMINAL LAW," 19.

## O.

## OFFICE AND OFFICER:

1. *County Auditor, When.* After chapter 87 of the Laws of 1891 was passed and took effect, there could be no such officer as county auditor in any county with less than 45,000 inhabitants, except in Leavenworth county. *Lawson v. Comm'rs of Reno Co.*..... 271
2. *County Board—Recognition of Member.* *Mandamus* will not lie to compel one of the members of a board of county commissioners and the county clerk to recognize a person as county commissioner who has had a judgment rendered against him in a contest proceeding, instituted to determine who was elected to such office, and who has also been ousted from the office by a judgment of the district court in proceedings in *quo warranto*. The peremptory writ of *mandamus* should not issue unless there is a clear and specific legal right to be enforced, and there is no other particular and adequate legal remedy. *Swartz v. Large*..... 304
3. *School District—Appointment of Treasurer—Failure to Give Bond.* Where H. is elected as his own successor treasurer of a school district at the annual meeting of said district, and immediately takes the oath of office and continues to perform all the duties of said office for a year without giving a bond, but then gives a bond which is executed according to law, and approved by the director and clerk, and said bond was given as soon as the board fixed the amount of said bond, and afterward, a week or 10 days, the county superintendent appoints H. treasurer for said district, upon the theory that a vacancy exists, because the bond was not given within 20 days after the election of said treasurer, *held*, that no vacancy existed to be filled by appointment of the superintendent, and that the appointment of H. was void. *Horneman v. Harlan*..... 418



## OFFICE AND OFFICER—CONTINUED:

4. *Railroad Company — Repairs — Recommendation of Railroad Commissioners.* Under the provisions of § 5, chapter 124, Laws of 1888, (§ 1828, Gen. Stat. of 1889,) an order or recommendation of the board of railroad commissioners of the state to a railroad company, requiring repairs to be made upon its road or track, to promote the security, convenience and accommodation of the public, is advisory only. Such an order or recommendation is not final or conclusive upon the railroad company or in the courts. *The State, ex rel., v. K. C. Rld. Co.* 497

OMNIBUS—SEE "EXEMPTION."

OWNERSHIP—SEE "EVIDENCE," 8.

## P.

PAROL EVIDENCE—SEE "EVIDENCE," 11.

## PARTIES:

- Defect of Parties—Waiver.* A defect of parties should be raised either by answer or demurrer, and, when not so taken advantage of, is usually waived. The evidence examined, and found sufficient to support the special findings and judgment of the trial court. *Hurd v. Simpson*..... 245
- See "MECHANICS' LIEN," 1; "MORTGAGE," 1.

## PARTNERSHIP:

1. *Administration—Right to Partnership Property—Surviving Partner.* The administratrix of the estate of a deceased member of a copartnership consisting of two persons has no legal right to take the possession of the property of the partnership from the surviving partner until such surviving partner has been cited for that purpose, and neglects or refuses to give the bond required by ¶ 2817, General Statutes of 1889, and until the administratrix of the undivided estate of the deceased partner has given the further bond required by ¶ 2820, General Statutes of 1889. *Teney v. Laing*..... 297
2. *Erroneous Proceedings by Administratrix.* When the administratrix of the estate of a deceased member of a copartnership consisting of two persons, without citing the surviving partner, and without executing the further bond, commences proceedings in the probate court under ¶¶ 2982, 2983, 2984, 2985, 2986, or under ¶¶ 2821 and 2822, against the surviving partner and other persons, to get possession and control of the partnership property, it is error not to dismiss such proceedings on motion made for that purpose. *Id.*..... 297
3. *Contract by Surviving Partner to Pay Firm Debts.* A contract made between a surviving partner, the widow of a deceased partner, who left minor children, and a part of the individual creditors of the deceased partner, that the surviving partner should pay a proportionate share of the individual indebtedness of the deceased partner, and retain all the partnership property, is against public policy, and is illegal and void. *Cox v. Grubb*..... 435

## PARTNERSHIP—CONTINUED:

4. *Void Contract*. A promise made by the surviving partner to a creditor of the deceased partner, in pursuance of such an agreement, to pay such creditor a proportionate share of the individual debt, is illegal and void. *Id.*..... 485  
See "ACCOUNT-BOOKS."

## PART PERFORMANCE—SEE "CONTRACT," 14.

## PAYMENT—SEE "PROMISSORY NOTE," 1.

## PENALTY—SEE "DAMAGES," 7.

## PENITENTIARY:

*Eight-Hour Law—Officers and Employés in Penitentiary*. The officers and employés mentioned in §20, chapter 152, Laws of 1891, are not embraced in the provisions of chapter 114, Laws of 1891, making it unlawful for laborers, workmen, mechanics, or other persons, employed by the state of Kansas, to work more than eight hours a day. *The State, ex rel.; v. Martindale*, 147

## PERSONAL JUDGMENT—SEE "JUDGMENT," 7, 10.

## PERSONAL PROPERTY:

1. *Affixed to Realty—Status*. In the sale of personal property that is to be affixed to realty, the contracting parties at the time of the sale have the power, as between themselves, at least, to fix the *status* of such property, and to say whether, when affixed to the realty of the vendee, it shall remain personal property or become a part of such realty. *Marshall v. Bachelder*..... 442
2. *Homestead—Not an Improvement*. By the express terms of the contract of sale of the property for which the debt sought to be enjoined in this case was created, the ownership and possession of the property sold was to remain in H. until the price was paid. *Held*, That under such contract, as between H. and B., the property sold, though it subsequently became affixed to the homestead of B., remained personal property, and did not constitute an improvement upon the homestead; and the latter was exempt from sale to pay the debt contracted therefor. *Id.*..... 442

## PETITION—SEE "AMENDMENT," 2, 4.

## PETITION IN ERROR—SEE "PRACTICE, SUPREME COURT," 16.

## PLEA IN ABATEMENT—SEE "CRIMINAL LAW," 22.

## PLEADING AND PRACTICE:

1. *Insurance—Action on Policy—Evidence and Instructions, not Within Issues*. In an action to recover on a policy of insurance, the plaintiff alleged the contract of insurance, the loss by fire, and the refusal of payment. The insurance company answered that a material condition of the contract had been broken, and that the rights of the assured under the policy had been forfeited. The plaintiff replied by a general denial. On the trial, proof was offered over objection tending to show that the company had waived the condition and was estopped from taking

## PLEADING AND PRACTICE—CONTINUED:

- advantage of the forfeiture, and also that since the loss a final compromise and settlement had been agreed upon between the assured and an agent of the company. *Held*, That this evidence and the instructions based thereon were not within the issues and should have been excluded. *Insurance Co. v. Johnson* ..... 1
2. *Estoppel—Acts to be Plead.* All acts, representations and conduct relied on as an estoppel should be specially pleaded before evidence to establish the same can be received. *Id.*... 1
3. *Defective Record—Case, Dismissed.* Where the record on appeal shows that the findings and judgment are entitled in another case, without any explanation other than by counsel for plaintiff in error in their brief, to the effect that the same were adopted by the trial court from the other case, without changing the title, the petition in error will be dismissed. *Kerndt v. Comm'rs of Cheyenne Co.* ..... 6
4. *Hearsay Testimony—No Material Error.* Where hearsay testimony is introduced in the trial of an action, but it appears that the adverse party's rights were not thereby prejudiced, *held*, that no material error was committed. *A. T. & S. F. Rld. Co. v. Collins.* ..... 11
5. *Incompetent Evidence—Harmless Error.* The admission of incompetent evidence, which is not prejudicial, is not sufficient ground to set aside a judgment and grant a new trial. *Id.*... 11
6. *Judgment, When not Vacated.* A defendant in an action to foreclose liens of material-men and mechanics, who is personally served with summons, and allows judgment to go against him by default, is not entitled, nearly six months thereafter, and at a subsequent term of the court, and after the property has been sold at sheriff's sale, to have the judgments vacated on motion or petition, without showing that he has a defense to the whole or a part of the action in which the judgments are rendered. *Coffey v. Carter.* ..... 22
7. *Note—Action—Unverified Answer—Pleading Payment.* In an action on a note and mortgage, where the petition is sworn to, an unverified answer alleging payment and satisfaction of the debt will put in issue the question of payment, and it is error for the trial court to render judgment on the pleadings in favor of the plaintiffs. *O'Bryan v. Standiford.* ..... 24
8. *Fractions of a Day—Judicial Notice.* Where it is necessary to justice, and it can be done, the courts may take notice of the fractions of a day; and the precise time when an act is done may be shown. *Coal Co. v. Barber.* ..... 29
9. *Plea, Bad.* The plea of a subsequent county-seat election *held* bad, upon the same authority. *The State, ex rel., v. Burton.*... 44
10. *Note—Consideration—No Fraud to Bar Recovery.* Where a surety was induced to renew a note upon the representation of the payee that the consideration of the original note was for money paid to the principal maker over the counter of a bank by the payee, when in fact the consideration was for money paid by the payee for the benefit of the principal maker to another party for the purchase-price of an interest in a patent-right, *held*, that no such fraud or deceit is shown as to bar the

## PLEADING AND PRACTICE—CONTINUED:

- recovery on the note by the payee against the surety. *Acker v. Warden*..... 51
11. *Guardian—Acts, Valid against Collateral Attack.* Where letters of guardianship are issued and recorded in the probate judge's office, and the guardian gives bond and duly qualifies and enters upon the discharge of his duties as guardian with the approval of the probate judge, and all this is of record, the guardian's acts will be held valid when attacked collaterally, although there may not be any further record in the probate judge's office of his appointment. *Howbert v. Heyle*..... 58
12. *Petition, Sufficient against Collateral Attack.* Where a petition by a guardian to sell certain land belonging to his ward states, among other things, that the ward had no money or personal property, and that it was to his interest and necessary for his support and education that the land should be sold, and describes the land as being an undivided one-twelfth interest "in the following-described real estate, to wit, the southeast quarter of section 32, range 17, township 12," without stating specifically in what county or state the land was situated, or whether in range east or west, or township north or south, but land answering to the aforesaid description was in fact situated in Shawnee county, where all the parties interested resided, and where all the proceedings were had, *held*, that the petition must be held to be sufficient when the sale under it is many years afterward attacked collaterally. *Id.*..... 58
13. *Service, Sufficient against Collateral Attack.* Where the petition and notice for the sale by a guardian of his ward's real estate are each signed by the guardian and served upon the minor by an individual who is not an officer, and the proof of the service is shown by the affidavit of the person who served the same, and all were filed in the probate judge's office, and the probate judge, as well as the district court, found that the service was sufficient, *held*, that the supreme court must also consider it sufficient, and especially so where the service is attacked only in a collateral proceeding. *Id.*..... 58
14. *Service in Due Time.* Where the aforesaid petition and notice were served on April 18, and the hearing was to be had and was had on April 28, *held*, that the service was at least 10 days prior to the time fixed for the hearing, within the meaning of the statute. *Id.*..... 59
15. *Trespass on Lands—Injunction, Refused.* When a petition states a cause of action in damages to real estate, and also asks for an injunction to restrain the defendant from trespassing thereon, and the jury find that the defendant had trespassed on plaintiff's land as alleged in the petition, but that he had abandoned his trespasses before suit was begun, and the court refuses to perpetuate the injunction, but renders judgment for the plaintiff for nominal damages and costs, *held*, not error. *Curtis v. Paggett*..... 86
16. *Setting Aside Default.* The setting aside of defaults and permitting pleadings to be filed out of time is largely discretionary with the trial court, and its rulings thereon will not be disturbed unless there is a clear abuse of discretion. *Hopkins v. Hopkins*..... 108

## PLEADING AND PRACTICE—CONTINUED:

17. *Replevin—Vacating Order of Delivery—Review.* An order of the district court vacating an order of delivery issued in an action of replevin is immediately reviewable in the supreme court; the aggrieved party is not required to await the final determination of the cause in the district court. *Carr v. Huffman*..... 188
18. An order of delivery cannot be set aside and vacated by the district court after answer for any informality or irregularity in its issue, or because no *proscipe* was filed by the party desiring it. *Id.*..... 188
19. *New Trial—Harmless Error.* The introduction of immaterial evidence, which is not prejudicial to the rights of the defendant, is not sufficient ground to grant a new trial. *C. K. & W. Rld. Co. v. Woodward*..... 191
20. *Defect of Parties—Waiver.* A defect of parties should be raised either by answer or demurrer, and, when not so taken advantage of, is usually waived. The evidence examined, and found sufficient to support the special findings and judgment of the trial court. *Hurd v. Simpson*..... 245
21. *Counties—Corporate Existence—Collateral Attack.* Where a public organization, of a corporate or quasi-corporate character, has an existence in fact, and is acting under color of law, and its existence is not questioned by the state, its existence cannot be collaterally drawn in question by private parties. *In re Short, Petitioner*..... 250
22. *Validity of County Organization.* Therefore, where a county has been organized under valid laws, and is acting as a county under valid laws, and a judgment is rendered in such county or by virtue of proceedings commenced in such county against an individual, providing for his imprisonment because of his having committed a public offense in such county, and under the judgment he is imprisoned, such individual cannot, in a proceeding in *habeas corpus*, attack the validity of the existence of such county upon the ground merely that "the plats, field-notes and records of the original government survey now on file in the office of the auditor of state in the state capitol" show that the county, as originally created by the legislature, and as afterward organized and as now existing, contains only 480½ square miles in area, while the constitution requires that no county shall be organized with a less area than 482 square miles. (Const., art. 9, § 1.) *Id.*..... 250
23. *Conveyance—Fraud—Evidence.* In an action to set aside a conveyance on the ground of fraud, proof was offered tending to show that the conveyance was executed when the grantor, a merchant, was financially embarrassed and practically insolvent, to his clerk, who had no money with which to pay for the property, and who gave an unsecured promissory note for the entire consideration; also, that there was an agreement between them to say to any inquirers that the consideration was the promissory note and \$500 additional, which the grantor was owing the grantee, when, in fact, no such indebtedness existed. Testimony was also offered to show that the grantee had been in the employment of the grantor for about a year, and had opportunity to know the condition of his business, and that he purchased the land without examining its quality or the condition of the title

## PLEADING AND PRACTICE—CONTINUED:

- thereto. A demurrer was interposed to the testimony of the plaintiff; and it is *held*, that the evidence, measured by the rule applicable when a demurrer is filed thereto, warranted the inference that the conveyance was voluntary, and made with the intent of both grantor and grantee to hinder and delay the creditors of the former, and that it was sufficient to resist the demurrer which was interposed. *Schuster v. Kurtz*..... 255
24. The rejection of testimony which only tended to establish questions not in dispute is not error. *W. & C. Rly. Co. v. Gibbs*... 274
25. *Mortgage—Foreclosure—Personal Judgment.* Where an action is brought for the foreclosure of a real-estate mortgage and a personal judgment upon the notes secured thereby against the purchaser of the mortgaged premises, who has assumed the payment of the notes secured by the mortgage, and the makers of the notes and mortgage, the failure to indorse the summons, as in an action for the recovery of money only, will not render the personal judgment against such purchaser, or the makers of the notes and mortgage, void. *Beverly v. Fairchild*..... 289
26. *Corporation—Rights of Stockholders and Creditors.* T. and P. were members of a corporation. The company, being in debt, conveyed its real estate to P., in trust, upon which to borrow money to pay indebtedness, but P. afterward refused to recognize the trust, and claimed the property as his own. T. was an indorser and guarantor of the company, and to protect himself was compelled to take an assignment of a judgment obtained by a creditor against the company. He caused a levy to be made upon the property transferred to P. and also began proceedings to cancel and set aside the conveyance to P., and to have the property subjected to the payment of his judgment. P. claimed that the company was owing him a large sum of money. Afterward the land was sold on execution levied at the instance of T. A sale was fairly and regularly made of the property to T., was confirmed by the court, and a sheriff's deed made to the purchaser. Afterward, P. proposed to pay T. the amount of his claim, but no actual tender was made, nor was any proposal made until after the claim was extinguished by the sale and conveyance of the property to T. On the trial the issues were found in favor of T. P. then asked the court to fix a short time within which he could pay off T.'s judgment and take the land free from the lien of such judgment, but the request was refused, and a judgment canceling the deed of the company to P. was entered. *Held*, That the refusal and entry of judgment were not erroneous. *Pickens v. Taylor*..... 294
27. *Service by Publication—Affidavit.* Before service can be made by publication, an affidavit must be filed stating that the plaintiff is unable to make service of the summons upon the defendant, and that the case is one of those mentioned in § 72 of the civil code. Without such an affidavit, the attempted service by publication is insufficient. *Grouch v. Martin*..... 313
28. *New Trial—Application.* Where an application by petition is filed for a new trial, under the provisions of § 310 of the civil code, no verification thereof is required. *Moody v. Branham*... 314
29. *Fraud—Concealment—Limitation of Action.* The statute of limitations does not begin to run against an action for relief on the ground of fraud until the fraud is discovered by the

## PLEADING AND PRACTICE—CONTINUED:

- party aggrieved. But where this exception is relied on, and the plaintiff's petition shows that the fraud was consummated more than two years before the commencement of the action, it is incumbent on him to allege that he did not discover the fraud until within the two-year period of limitation, in order to take it out of the operation of the statute. An allegation that he did not find the whereabouts of the defendant is not equivalent to an averment of a failure to discover the fraud. *Myers v. Center*..... 824
80. *Evidence as to Signature.* Where the trial court permits a witness, over the objection of the defendants, to write his signature in the presence of the jury, for their inspection and comparison with a signature to a chattel mortgage which is claimed to have been forged, and afterward, upon cross-examination, the defendants ask the witness to stand up and write his name in the presence of the jury, and then offer the same in evidence, *held*, that the defendants cannot now complain of such evidence. *Allen v. Gardner*..... 837
81. *New Trial—"Thereupon"—Meaning.* "Thereupon the defendants filed in writing their motion for a new trial." The word "thereupon" in this sentence, which appears in the record immediately after the verdict of the jury, construed as an adverb of time, and *held* to mean, "without delay or lapse of time." *Hill v. Wand*..... 840
82. *Railroad Companies—Roads through Inclosed Lands—Fences.* Under the provisions of chapter 154 of the Laws of 1885, compelling railroad companies to fence their roads through lands inclosed with a lawful fence, before the owner of the lands can recover the value from a railroad company of a fence built by him in accordance with the provisions of the statute, he must prove that his lands, or a part thereof, which are claimed to be inclosed have a lawful fence—that is, such a fence as is defined by the statute to be a legal or lawful fence. *Mo. Pac. Rly. Co. v. Youngstrom*..... 849
83. *New Trial—Time of Filing Motion—Presumption.* Where an entry of the proceedings taken in a case shows when the trial was begun, but does not affirmatively show when the final decision was made, and it is shown that a motion for a new trial was filed five days after the trial was commenced, which motion was entered and allowed, it will be presumed by the supreme court, for the purpose of upholding the judgment of the court below in granting a new trial, that the motion was filed within three days after the final decision was made. The evidence offered by the plaintiff below is found to be sufficient to take the case to the jury, over a demurrer interposed against it. *W. & W. Rld. Co. v. Johnson*..... 851
84. *Demurrer—Objection to Evidence—Trial.* On the trial of a cause, a defendant may object to the reception by the court of any evidence under the petition, although his demurrer to the same petition has previously been overruled; and the court commits no error by entertaining and passing upon said objection. *Goodrich v. Comm'rs of Atchison Co.*..... 855
85. *Receiver—Appointment before Action Brought.* Where a receiver is appointed before the intended action is commenced, the appointment is void; but where the intended action is after-

## PLEADING AND PRACTICE—CONTINUED:

- ward commenced and the defendant afterward makes a voluntary appearance and presents a motion to remove the receiver, and the court or judge overrules the motion, the person originally appointed as receiver will then become such and be such from that time on. *Guy v. Doak*..... 866
86. *Husband and Wife—Action—Misjoinder—Joint Judgment.* Where a husband and wife sell and convey jointly and by a joint deed certain real estate to H. for the joint consideration of \$5,650, and afterward the grantors commence a joint action against H. for the purchase-price of the land, and the petition states and shows a joint cause of action for the purchase-price of the land, and no question is raised as to a misjoinder of causes of action or of parties by either a demurrer or an answer, but on the trial it appears that each of the plaintiffs owned a separate portion of such real estate, and the trial court rendered a joint judgment in favor of the plaintiffs and against the defendant for the amount of the purchase-price still remaining due and unpaid, *held*, not error. *Hurd v. Simpson*..... 872
87. *Findings—Verdict—Harmony.* If the findings of the jury will fairly admit of an interpretation which will make them harmonious with each other and with the general verdict, that interpretation should be given, rather than one which will overturn and destroy the findings and verdict. (Following *Railroad Co. v. Ritz*, 38 Kas. 404.) *Jackson v. Linnington*..... 897
88. *Burden of Proof.* Where, under the pleadings and § 108 of the civil code, the plaintiff's case is admitted by the defendant and where nothing materially adverse is admitted by the plaintiff, the burden of proof rests upon the defendant. *Machine Co. Morse*..... 429
89. *Trial—Admissions—Direction of Judgment.* The court is warranted in acting upon the admissions made by parties during the trial of a cause; and where the plaintiff, in making the opening statement of his case to the court and jury, admits or states facts the existence of which absolutely precludes a recovery by him, the court may close the trial at once and give judgment against him. *Lindley v. A. T. & S. F. Rld. Co.*..... 432
40. *Ownership—Pleading and Proof.* A plaintiff alleging ownership of property at a certain time is not restricted, as to the evidence of such ownership, to the very day fixed in the petition, but may introduce evidence to establish ownership prior to the time stated in the pleading. The evidence considered, and found sufficient to sustain the verdict of the jury. *Russell v. Bradley*..... 438
41. *Instructions—No Exception.* Instructions not excepted to will not be reviewed. *Id.*..... 438
42. *New Trial—Motions Overruled—No Review, When.* When errors complained of relate to matters occurring on the trial, for which a new trial is asked, but the action of the court in overruling the motion for a new trial is not assigned as error, they cannot be considered in this court. (*Struthers v. Fuller*, 45 Kas. 735, cited and followed.) *Dryden v. C. K. & N. Rly. Co.*..... 445
43. *Trial—Errors, When Considered.* Errors occurring during the trial cannot be considered by the supreme court unless a mo-



## PLEADING AND PRACTICE—CONTINUED:

- tion for a new trial, founded upon and including such errors, has been made by the complaining party, and acted upon by the trial court, and its ruling excepted to, and afterward assigned for error in the supreme court. *Cogshall v. Spurry*.... 448
44. *Coal Dust—Explosive Element—Judicial Notice.* In an action to recover for injuries resulting from a colliery explosion, the court will not take judicial notice that dry, fine coal dust is a dangerous and explosive element in a coal mine. *Coal Co. v. Wilson*..... 460
45. *Continuance—Refusal, Error.* There was an agreement between counsel for plaintiff and defendant that the testimony given by certain witnesses in a former case should be transcribed and used as a deposition in the present case, and the party in whose favor the testimony was given relied on the agreement, and did not procure the attendance of the witnesses, but at the trial the testimony of such witnesses, which is material and important, and which, if treated as a deposition taken in this case, would have been competent and admissible, was excluded from consideration upon the objection of the opposing party. The other party then applied for a continuance of the cause on account of the exclusion of the testimony and the inability to otherwise obtain the same, which application was denied. *Held, Error.* Either the testimony should have been received or the continuance granted. The testimony in the case tending to sustain the charge of negligence as made examined, and *held* to be sufficient to take the case to the jury. *Id.*..... 460
46. *Attachment—Waiver of Irregularities.* In an action on an account not due, the defendants made a general appearance, and filed a motion to dissolve the attachment, for the reason that the grounds set forth in the affidavit for the attachment were false. This motion was overruled, and the facts necessary to give jurisdiction in such actions thereby established. In the motion to dissolve the attachment, no irregularity in the issue and service of the order of attachment was stated or insisted upon. *Held,* That all questions of irregularity were waived. *Hillyer v. Biglow*..... 478
47. *Special Questions—Refusal, Error.* When a party to an action in a proper manner requests the court to submit to the jury proper special interrogatories to be answered by the jury, the court commits error if it refuses to so submit them. *Jones v. Annis*..... 479
48. *Judgment—Vacation for Fraud.* Where a judgment obtained against several defendants is sought to be vacated on account of the fraud practiced by the successful party, and it is also alleged that it is void as to some of the defendants because no service of summons was made upon them, those not served are not confined to the remedy prescribed in the last clause of § 575 of the civil code, of having the judgment vacated on motion, but may join with the other defendants in an action to have it set aside for the fraud practiced by those who obtained the same. The allegations of fraud contained in the petition examined, and, although somewhat indefinite, are *held* to be sufficient to withstand a demurrer filed against the same. *Steele v. Dunoon*..... 511

## PLEADING AND PRACTICE—CONTINUED:

49. *Trial—Complete Record.* The record in this case examined, and *held*, that it affirmatively shows that it contains all the proceedings, evidence and instructions in the case, as tried in the court below. *Insurance Co. v. Wood*. . . . . 521
50. *Supplemental Petition.* Where the facts existing at the time of and before the trial, in any case, would authorize the plaintiff to recover, provided they were properly pleaded and proved, but some of them, which were properly pleaded but are not sufficient to authorize a recovery, took place prior to the commencement of the action, and the others, which are not pleaded and are not sufficient to authorize a recovery, took place afterward, the plaintiff may, under § 144 of the civil code, set forth in a supplemental petition, upon such terms as to costs as the court might prescribe, the facts which took place after the commencement of the action; and it would be error for the court to refuse to permit the same to be done. *Austin v. Jones*. . . . 565
51. *Statement of Court—Prejudicial Error.* One of the controverted questions on the trial of the appeal was the ownership of the land taken. Before the trial the railway company made a written offer to allow judgment to be taken against it in favor of B. for \$1,000 and costs. The offer was not accepted, and the parties proceeded to trial. After the evidence had been offered and the charge of the court had been given, the court stated in the presence and hearing of the jury that "the Chicago, Kansas & Nebraska Railway Company has filed a paper in this case in which it recognizes Ernest Broquet as defendant or party in interest herein, and in which it made a certain offer to settle with said Broquet for damages to the land in question." *Held*, That, under the issues and circumstances of this case, the making of the statement was prejudicial error. *C. K. & N. Rly. Co. v. Broquet*. . . . . 571
52. *Mortgage—Foreclosure—Jury Trial.* In an action to foreclose a mortgage, a surety on the note secured filed an answer that did not state a defense to the action, and demanded a jury trial. *Held*, It was not error in the trial court to refuse a jury trial. *Goodacre v. Skinner*. . . . . 575
53. *Supplemental Pleadings.* Supplemental pleadings can only be filed by leave of the court, after reasonable notice. *Id.*. . . . . 575
54. *Death of Party—Revivor of Action.* The statute provides that an order to revive an action upon the death of either the plaintiff or defendant cannot be made after the expiration of one year without the consent of the opposite party. *Bradford v. Loan Co.*. . . . . 587
55. *Petition—Amendment.* The petition in this case examined, and *held*, that the petition might have been amended on the trial to conform to the facts proven, and that this court will treat it as having been thus amended, and will not reverse the case because of a variance between the petition and the facts proven and the judgment rendered thereon. *Tipton v. Warner*, 606
56. *Taking Books to Jury-Room.* Whether the jury should be allowed to take to their room when they retire for consultation the account-books of a partnership, is a question resting largely

## PLEADING AND PRACTICE—CONTINUED:

- in the discretion of the trial court, and to reverse a judgment for that reason it must affirmatively appear that such discretion has been abused. *Wood v. Wood*..... 617
57. *Fire Set by Locomotive—Pleading and Proof.* In an action against a railway company for damages by fire caused by the operation of such railway, under ¶ 1321 of the General Statutes of 1889, it is only necessary to allege and prove that the fire complained of was caused by the operation of the defendant's railway, to make out a *prima facie* case. Instruction given and refused considered, and found that the trial court committed no error. *Ft. S. W. & W. Rly. Co. v. Tubbs*..... 630
58. *Petition—Findings—Verdict—Case, Distinguished.* Where the plaintiff alleged in his petition that the negligence of the defendant consisted in the omission to keep its roadway clean, and that it negligently allowed dry grass to accumulate and remain on the line of its right-of-way, and the jury returned a special finding that the fire was caused by defective engine, in allowing coals of fire to drop from the fire-box and ignite the dry grass on the right-of-way, *held*, that the special finding and general verdict of the jury were in accord with the allegations of the petition, notwithstanding the fact that the petition contained no statement charging that the engine was defective. The case of *St. L. & S. F. Rly. Co. v. Fudge*, 39 Kas. 543, distinguished. *Id.*..... 630
59. *Attorney's Fee—Demand—Jury.* Where the plaintiff desires to recover an attorney's fee, in an action instituted under ¶ 1321 of the General Statutes, he should demand the same in his petition; and when the case is tried by a jury, the question of attorney's fee should be submitted, with the other facts in the case, to the jury. *Id.*..... 630
60. *Fire Caused by Locomotive.* In an action against a railroad company for damages caused by fire, where the plaintiff alleges in his pleading facts sufficient, which would, if proved, make out a *prima facie* case against the railroad company under chapter 155 of the Laws of 1885, (Gen. Stat. of 1889, ¶ 1321,) sufficient facts are alleged to constitute a cause of action against the railroad company. *St. L. & S. F. Rly. Co. v. Snavely*, 637
61. *Motion to Make Definite.* A motion made by the defendant to require the plaintiff to so amend his pleading as to make it more definite and certain is generally made too late when it is not made until after the case is called for trial. *Id.*..... 637
62. *Res Judicata—Merger.* An action instituted in another state to have certain conveyances set aside, and subject the property described therein to the payment of the plaintiff's judgment and the claims of all other creditors who might come and set up their demands, is not a bar to an action brought by one of such creditors in this state upon a promissory note owned by him, notwithstanding the fact that he appeared in the former action, filed a cross-petition, and obtained a finding from the court of the amount due him upon his note, but did not obtain a personal judgment against the defendant in that action, nor receive anything from the sale of the property affected by such proceeding. To constitute a merger, there must be a valid and

## PLEADING AND PRACTICE—CONTINUED:

- subsisting judgment rendered on the cause of action. *Cackley v. Smith*..... 642
63. *Mechanics' Liens—Action by Subcontractors—Parties—Counterclaim by Owner.* Under ¶ 4788, (mechanics' liens,) General Statutes of 1889, a subcontractor or other person who brings an action against the owner of a building for materials used in its construction must make the original contractor a party, and if the subcontractor or other person fails or refuses to do so, and the contractor has notice or knowledge of the pendency of the action and fails to defend the maker against such demand, the owner may defend at the cost and expense of the contractor. If the contractor is not shown to have notice or knowledge of the pendency of the action, the owner has a cause of action against the subcontractor or other person for damages by reason of the wrongful institution of the action, because of the failure to make the contractor a party. When the contractor assigns all the money due on a building contract to a lumberman who had furnished material, and who had primarily brought suit without making the contractor a party, the owner can plead such cause of action as a counterclaim. *Tracy v. Kerr*..... 656
64. *Cross-Petition—Answer—Amendment of Cross-Petition.* Where a cross-petition sets up a mechanics' lien, and prays for a foreclosure of the same and a sale of the premises therein described, and an answer is filed containing, among other things, a general denial, and upon the trial the court permits the answer to be amended so as to allege the abandonment of work upon the building in the place of its completion, the answer on file will be regarded as putting in issue the amendment to the cross-petition; and therefore, when the court and parties proceed with the trial as if the alleged abandonment was one of the issues of the case, the failure of the court to permit the filing of a new denial is not erroneous or prejudicial. *Springs Co. v. Lumber Co.*..... 672
65. *Mechanics' Lien—Timely Filing—Enforcement.* Where the foreclosure of a mechanic's lien is tried before the court without a jury, and the court finds as a fact that certain work was done upon the building upon a specific date, it will be assumed, in the absence of any showing to the contrary, that the work was done under the contract, or with the consent of the owner. In either case, the owner would be liable for the work done and material furnished, and the mechanic's lien, if filed within the statutory time after such work was done and material furnished, would be in time. (The case of *Shaw v. Stewart*, 43 Kas. 572, followed.) *Id.*..... 672
66. *Instructions, When to be Given.* Instructions are not to be given unless applicable to the facts disclosed upon the trial. *C. K. & N. Rly. Co. v. Stewart*..... 704
67. *Replevin—General Denial.* In an action of replevin, any defense to the action may be proved under an answer containing a general denial only; and the plaintiff may, without a reply, rebut any defense proved thereunder. *White v. Gemeny*..... 741
68. *Warranty—Action for Breach—Amendment of Petition.* The plaintiffs commenced an action against the defendant for damages resulting from the purchase and sale of a horse which was purchased by the plaintiffs and sold by the defendant for a par-

## PLEADING AND PRACTICE—CONTINUED:

- ticular purpose, but was worthless for that purpose; and this transaction was brought about by the wrongful statements of the defendant. Afterward the court permitted the plaintiffs to so amend their petition as to show that these wrongful statements included an express warranty that the horse was fit for the purpose for which he was bought and sold, but at the same time imposed upon the plaintiffs substantially all the costs made in the case up to the time of making the amendment. *Held*, That the court did not err in permitting the amendment. *Culp v. Steere*..... 746, 747
69. *New Trial—Amendment of Motion.* The defendant filed his motion for a new trial within proper time; but more than three days thereafter, and indeed nearly two months thereafter, he asked leave of the court to amend his motion for a new trial by adding thereto the following, to wit: "Errors of law occurring at the trial and excepted to by the defendant," which leave was refused by the court. *Held*, Not error. *Id.*..... 747
70. *Evidence.* In an action to recover the purchase-money, B. is not required to go behind the record and show that, in fact, the mortgage has not been paid. It is sufficient if he show the mortgage of record and unsatisfied. *Kimball v. Bell*..... 757
71. *Demurrer to Evidence.* Having made such showing, a demurrer to the evidence will not lie upon the ground that he failed to show the mortgage had not in fact been paid. *Id.*..... 757
72. *Trial on Wrong Theory.* Where an action to recover back the purchase-money has been erroneously tried by the court below upon the theory that time was of the essence of the contract, and that the vendee upon the payment of the last installment of the purchase-money might immediately demand a deed, and if not forthcoming at once, might commence his suit to recover back his purchase-money, yet if the record shows that at the time of the trial, more than three months after the final payment and demand for a deed, and after a lapse of a reasonable time after such payment and demand, the vendor was not in a position to perform the conditions of his bond, by giving an indefeasible estate in fee-simple, the fact that the case was tried upon a wrong theory does not constitute necessarily reversible error. *Id.*..... 757
73. *Attachment—Dissolution—Affidavits as Evidence—Notice.* The defendant in an attachment action moved to dissolve the attachment because the grounds laid for the same were untrue, and at the same time made and filed an affidavit alleging that the grounds were untrue, but he did not state in his notice to plaintiff that affidavits would be used on the hearing of the motion. At the time set for the hearing plaintiff asked and obtained a continuance of the hearing to enable him to procure evidence to resist the motion and affidavit of defendant. At the final hearing the affidavit mentioned was admitted in evidence over the objection of plaintiff. *Held*, That the defendant's failure to state in his notice that affidavits would be used on the hearing did not render the reception of the affidavit prejudicial error. *Drug Co. v. Malm*..... 762
74. *Removal of Cause.* A plaintiff who institutes an action in the state court cannot remove the same to the United States circuit court on account of prejudice or local influence. *Id.*..... 762

PLEADING AND PRACTICE—CONTINUED:

75. *Res Judicata*—Rule. The rule of *res judicata* applies as well to facts settled and adjudicated as to causes of action. *C. K. & W. Rld. Co. v. Comm'rs of Anderson Co.*..... 786
- See "ACTION;" "ATTACHMENT;" "CRIMINAL LAW;" "EJECTMENT;" "ERROR;" "EVIDENCE;" "FINDINGS;" "INJUNCTION;" "INSTRUCTIONS;" "JUDGMENT;" "JURY;" "JURISDICTION;" "JUSTICES, AND JUSTICES' COURTS;" "LIMITATION OF ACTIONS;" "MALICIOUS PROSECUTION;" "NEGLIGENCE;" "NEW TRIAL;" "PRACTICE, DISTRICT COURT;" "PRACTICE, SUPREME COURT;" "VERDICT;" "WITNESS."

POLICY—SEE "INSURANCE," 1, 2, 5, 6.

POST OFFICE—SEE "CITIES," 1.

PRACTICE, DISTRICT COURT:

1. *Evidence—Certified Paper not a Part of Case-made.* Where a case is made for the supreme court, and such case is settled and signed by the judge of the district court, and attested by the clerk thereof, and attached to such case is a paper containing what purports to be the evidence introduced on the trial in the district court, and it is certified to be such by the official stenographer of the court, and such evidence is not otherwise identified or authenticated, *held*, that it cannot be considered as any part of the case-made. *Mullaney v. Humes.*..... 99
2. *Review—Evidence not Duly in Record.* Evidence purporting to have been given on the trial of a case, and certified to by the official stenographer and by the clerk of the district court to be true and correct, and attached to a transcript brought to the supreme court, forms no part of the record, and cannot be considered unless it is preserved either by a bill of exceptions or case-made. *Hopkins v. Hopkins.*..... 108
3. *Receiver—Appointment, When Void.* A court or a judge at chambers has no power or jurisdiction to appoint a receiver when there is no action then pending. *Guy v. Doak.*..... 286
4. *Void Appointment.* Where a judge of the district court, by an order made at chambers, attempted to appoint a receiver on the 19th day of April, in an action that was not commenced until the 14th day of May of the same year, such appointment is absolutely void. *Id.*..... 286
5. *Intoxicating Liquors—Abatement of Nuisance.* The judge of the district court has no authority to make an order at chambers abating a place as a nuisance where intoxicating liquors are alleged to have been sold in violation of law, and forever enjoining the owner, lessee or keeper from maintaining such place. *In re Harmer, Petitioner.*..... 262
6. *Constructive Contempt—Error.* It is error for a court or judge in any case to proceed against a person for a constructive contempt, without an affidavit or information in writing, containing a statement of facts constituting the contempt charged, being first filed in court or submitted to the judge. *Id.*..... 262
7. *Appeal from a Justice—New Petition.* Where an action is appealed from a justice of the peace to the district court, and the plaintiff, with the consent of the defendant, files in the district

## PRACTICE, DISTRICT COURT—CONTINUED:

- court a new petition, setting up a claim exceeding \$300, and the defendant voluntarily appears and files his answer thereto, the district court has jurisdiction to hear and determine the action upon the pleadings filed in that court, the same as if there had been no appeal. *Mo. Pac. Rly. Co. v. Lea*..... 268
8. *District Courts—Jurisdiction—Claim against Decedent's Estate.* The district courts of this state have jurisdiction to entertain and enforce a demand against property of a deceased person who, by will, devoted almost his entire estate to the perpetuation of a banking business in which he had been engaged during his life-time, and whose continuance he committed to executors named in his will; the claim sought to be enforced in the district court having originated in the course of the banking business, some years after the death of the testator, and after all debts of the testator existing at the time of his death had been paid. *In re Hyde, Petitioner*..... 277
9. *Trial—Admissions—Direction of Judgment.* The court is warranted in acting upon the admissions made by parties during the trial of a cause; and where the plaintiff, in making the opening statement of his case to the court and jury, admits or states facts the existence of which absolutely precludes a recovery by him, the court may close the trial at once and give judgment against him. *Lindley v. A. T. & S. F. Rld. Co.*..... 432
10. *Opening Statement—Record.* Where such opening statement is not preserved in a bill of exceptions, it forms no part of the record of the district court. *Id.*..... 432
11. *Case, Followed.* The case of *Watkins National Bank v. Sands*, just decided, referred to and followed. The evidence in the present cases examined, and held, that under such evidence the decision of the district court discharging the attachments must be affirmed. *National Bank v. Sands*..... 596
12. *Justice of the Peace—Jurisdiction—Objections Too Late.* In an action commenced and tried before a justice of the peace, then appealed and tried in the district court, it is too late to raise a question of jurisdiction in this court, based upon a construction of the pleadings different from that on which the case was tried in the courts below. *Wood v. Wood*..... 617

## PRACTICE, SUPREME COURT:

1. *Defective Record—Case, Dismissed.* Where the record on appeal shows that the findings and judgment are entitled in another case, without any explanation other than by counsel for plaintiff in error in their brief, to the effect that the same were adopted by the trial court from the other case, without changing the title, the petition in error will be dismissed. *Kerndt v. Comm'rs of Cheyenne Co.*..... 6
2. *Appeal, When not Taken—Statute.* No appeal or proceeding in error can be had or taken from and after the publication of chapter 245, Laws of 1889, made on the 20th of March, 1889, to the supreme court in any civil action, unless the amount or value in controversy, exclusive of costs, exceeds \$100, except in cases involving the tax or revenue laws, or the title to real estate, or damages for slander, libel, malicious prosecution, or false imprisonment, or the constitution of this state, or the constitution, laws or treaties of the United States, and when in

PRACTICE, SUPREME COURT—CONTINUED:

- such a case the judge of the district or superior court trying the case involving less than \$100 shall certify to the supreme court that the case is one belonging to the excepted classes. (Civil Code, § 542a, Gen. Stat. of 1889, ¶ 4642.) *Coal Co. v. Barber*. . . . . 29
3. *Vested Rights—Valid Statute*. A party who has been defeated in a civil action in the district court has no vested right to an appeal or to the prosecution of proceedings in error in the supreme court to review the rulings or judgment of the district court before he has filed his appeal or proceedings in the supreme court; and an act of the legislature taking away the privilege of appeal or the permission to prosecute proceedings in error before the appeal or petition in error is filed, is valid and constitutional. *Id*. . . . . 29, 30
4. *Arrest—Action on Bond—Appeal—Supersedeas*. The institution of proceedings in error in the supreme court, and the giving of a *supersedeas* bond, under §§ 551 and 552 of the code, will not prevent the plaintiff below from maintaining an action upon a bond given to secure the discharge of the defendant from arrest in the original case. A *supersedeas* bond only stays the execution of a judgment or final order sought to be reversed. (*C. B. U. P. Rld. Co. v. Andrews*, 84 Kas. 563, followed.) *Heizer v. Pawsey*. . . . . 33
5. *Service, Sufficient against Collateral Attack*. Where the petition and notice for the sale by a guardian of his ward's real estate are each signed by the guardian and served upon the minor by an individual who is not an officer, and the proof of the service is shown by the affidavit of the person who served the same, and all were filed in the probate judge's office, and the probate judge, as well as the district court, found that the service was sufficient, *held*, that the supreme court must also consider it sufficient, and especially so where the service is attacked only in a collateral proceeding. *Houbert v. Heyle*. . . . . 58
6. *Evidence—Certified Paper not a Part of Case-Made*. Where a case is made for the supreme court, and such case is settled and signed by the judge of the district court, and attested by the clerk thereof, and attached to such case is a paper containing what purports to be the evidence introduced on the trial in the district court, and it is certified to be such by the official stenographer of the court, and such evidence is not otherwise identified or authenticated, *held*, that it cannot be considered as any part of the case-made. *Mullaney v. Humes*. . . . . 99
7. *Review—Evidence not Duty in Record*. Evidence purporting to have been given on the trial of a case, and certified to by the official stenographer and by the clerk of the district court to be true and correct, and attached to a transcript brought to the supreme court, forms no part of the record, and cannot be considered unless it is preserved either by a bill of exceptions or case-made. *Hopkins v. Hopkins*. . . . . 103
8. *Judgment—Technical Errors*. Judgment must be given in the supreme court upon appeal in criminal cases without regard to technical errors or instructions which do not affect the substantial rights of the parties. *The State v. Spendlove*. . . . . 160
9. *Replevin—Vacating Order of Delivery—Review*. An order of the district court vacating an order of delivery issued in an



## PRACTICE, SUPREME COURT—CONTINUED:

- action of replevin is immediately reviewable in the supreme court; the aggrieved party is not required to await the final determination of the cause in the district court. *Carr v. Huffman*..... 188
10. *Findings—Judgment, When not Reversed.* Where special findings are immaterial, a judgment will not be reversed, although there may be no evidence to support such findings. *Booge v. Scott*..... 247
11. *Judgment—Amendment in Supreme Court.* Where a trial court renders a judgment for a less amount than the verdict returned by the jury, such judgment cannot be corrected in the supreme court to conform to the verdict of the jury, in proceedings in error brought by the party against whom the judgment is rendered, when no cross-petition is filed by the party in whose favor the verdict is returned, asking for a correction or modification of the judgment. *Mo. Pac. Rly. Co. v. Lea*..... 268
12. *Replevin—Review—Bailees.* Where, in a suit in replevin, the action is tried upon the theory that the property was in the possession of the defendants, and the trial court so finds, and such finding is unchallenged, this court will not consider the question of the right of the plaintiff to maintain such action because he may have been a bailee of the property in controversy. *Allen v. Gardner*..... 337
13. *New Trial—Time of Filing Motion—Presumption.* Where an entry of the proceedings taken in a case shows when the trial was begun, but does not affirmatively show when the final decision was made, and it is shown that a motion for a new trial was filed five days after the trial was commenced, which motion was entered and allowed, it will be presumed by the supreme court, for the purpose of upholding the judgment of the court below in granting a new trial, that the motion was filed within three days after the final decision was made. *W. & W. Rld. Co. v. Johnson*..... 351
14. *Review—General Objection.* A party who complains of the rulings of the court in charging the jury, and who seeks to have them reviewed, should specify in his brief and argument wherein the rulings are erroneous. A mere general objection is insufficient. *Jackson v. Linnington*..... 396
15. *New Trial—Motions Overruled—No Review, When.* When errors complained of relate to matters occurring on the trial, for which a new trial is asked, but the action of the court in overruling the motion for a new trial is not assigned as error, they cannot be considered in this court. (*Struthers v. Fuller*, 45 Kas. 735, cited and followed.) *Dryden v. C. K. & N. Rly. Co.*..... 445
16. *Petition in Error—Amendment, When.* A petition in error in the supreme court may be amended more than one year after the ruling of the district court complained of has taken place, if the amendment is only to make good a defective, informal or incomplete allegation of error already contained in the petition in error; but when the proposed amendment sets forth an absolutely new and distinct allegation of error or cause for reversal, it cannot be made after that time. *Cogshall v. Spurry*, 448
17. *Trial—Errors, When Considered.* Errors occurring during the trial cannot be considered by the supreme court unless a mo-

PRACTICE, SUPREME COURT—CONTINUED:

- tion for a new trial, founded upon and including such errors, has been made by the complaining party, and acted upon by the trial court, and its ruling excepted to, and afterward assigned for error in the supreme court. *Id.*..... 448
18. *State Agent—Compensation—No Appropriation—Mandamus.* In the absence of any specific appropriation by the legislature to pay for the services of a state agent appointed under the provisions of chapter 176, Laws of 1877, (§§ 5982-5985, Gen. Stat. of 1889,) the supreme court will not compel, by *mandamus* or otherwise, the governor, auditor and attorney general to enter into or execute any contract with such agent for his compensation. *The State, ex rel., v. Humphrey.*..... 561
19. *Justice of the Peace—Jurisdiction—Objections Too Late.* In an action commenced and tried before a justice of the peace, then appealed and tried in the district court, it is too late to raise a question of jurisdiction in this court, based upon a construction of the pleadings different from that on which the case was tried in the courts below. *Wood v. Wood.*..... 617
20. *Action on Insurance Policy—Evidence for Jury.* In an action upon an insurance policy for loss by fire, where it appeared that an application had been received by the company, and the party making the same had possession of a policy of insurance in the company to which application had been made, and for which a note for the premium had been executed to such company, *held*, that there was evidence sufficient to go to the jury, and that this court cannot say there was a failure of proof showing that the insurer had executed and delivered a policy to the insured. The evidence examined, and found that no prejudicial error was committed by the trial court in the admission of the same. *Insurance Co. v. Laggart.*..... 668
21. *Errors of Law—Waiver.* Errors of law occurring at the trial must be assigned for cause in a motion for a new trial, and if this is not done this court will not pass upon them. *The State v. Tuchman.*..... 726

PREFERENCES—SEE "ASSIGNMENT FOR BENEFIT OF CREDITORS."

PRELIMINARY EXAMINATION—SEE "CRIMINAL LAW," 22.

PRESUMPTION—SEE "NEW TRIAL," 7.

PRIORITY—SEE "CHATTEL MORTGAGE," 1, 11.

PRIORITY OF LIENS—SEE "ATTACHMENT," 5.

PRIVATE JUDGMENT—SEE "JUDGMENT," 2.

PROBABLE CAUSE—SEE "MALICIOUS PROSECUTION," 1.

PROBATE COURT:

*Infant—Adoption—Res Judicata.* An order of the probate court permitting the adoption of an infant child is conclusive so far as that court is concerned. Such court has no further jurisdiction in the matter. The evidence in this case examined, and *held* not to justify this court in depriving the respondents of the custody of the child sought to be taken from them. *In re Bush, Petitioner.*..... 264

## PROBATE JUDGE:

*Salary.* A probate judge is entitled to be paid the salary provided for by ¶ 2524, General Statutes of 1889, without proof that he had actually performed the services contemplated by the "act relating to intoxicating liquors." *Comm'rs of Miami Co. v. Collins*..... 417

## PROMISSORY NOTE:

1. *Action—Unverified Answer—Pleading Payment.* In an action on a note and mortgage, where the petition is sworn to, an unverified answer alleging payment and satisfaction of the debt will put in issue the question of payment, and it is error for the trial court to render judgment on the pleadings in favor of the plaintiffs. *O'Bryan v. Standiford*..... 24
2. *Consideration—No Fraud to Bar Recovery.* Where a surety was induced to renew a note upon the representation of the payee that the consideration of the original note was for money paid to the principal maker over the counter of a bank by the payee, when in fact the consideration was for money paid by the payee for the benefit of the principal maker to another party for the purchase-price of an interest in a patent-right, held, that no such fraud or deceit is shown as to bar the recovery on the note by the payee against the surety. *Acker v. Warden*..... 51
3. *Forgery—Information.* It is proper to charge, in separate and distinct counts of the same information, the forgery of a promissory note, and the selling, exchanging or uttering of it as genuine. *The State v. Zimmerman*..... 242
4. *Rights of Surety—Chattel Mortgage—Lien.* The surety on a promissory note given for the purchase of personal property, to whom the property was delivered by the maker, has a right to retain the possession of said property against a chattel mortgagee, to whom the maker of said note executed a chattel mortgage while in temporary possession of the property by permission of the pledgee. *Clare v. Agerter*..... 604
5. *Assignment—Indorsement of Payment—Liability of Maker.* Where C., a stranger to a promissory note, takes the same from H., one of two makers, with an indorsement plainly written thereon: "Paid by H., this September 5, 1882, [which is the date of maturity,] and transferred to C.," "Without recourse, H.," and there is no mistake or fraud in the transaction, H. is relieved from liability on the note to C. or to his assignee. In an action on such a note, so indorsed, and where there is no fraud or mistake in the transfer, parol proof contradicting the indorsement, or which would change it from a conditional to an unconditional transfer, is not admissible. *Cross v. Holister*..... 652

PROSECUTION—SEE "STATUTE," 10.

PUBLICATION—SEE "STATUTE," 8, 9.

PUBLIC LAND—SEE "CONVEYANCE," 1.

PUBLIC POLICY—SEE "CONTRACT," 5.

## R.

## RAILROADS, AND RAILROAD COMPANIES:

1. *Carrier—Injuries to Stock—Notice of Claim.* A contract between a railroad company and a shipper of stock stipulated that, as a condition precedent to his right to recover damages for any loss or injury to such stock, he should give notice in writing to some officer of the railroad company, or its nearest station agent, before the removal of such stock from the place of delivery. In an action to recover damages for injuries to such stock while *en route*, where the condition of the stock was made known to the station agent of the railroad company at the place of destination, and such agent consented to the removal of the stock from the car, and had an opportunity to examine and inspect the animals after such removal and before they had mingled with other stock or been removed from the place of destination, and a written notice for damages was transmitted to the claim agent of the railroad company within four days after the removal of the stock from the car; and 10 days thereafter, upon the death of one of the animals, a subsequent notice for damages was given to the railroad company: *Held*, That there had been a substantial compliance with the contract, upon the part of the shipper. *A. T. & S. F. Rld. Co. v. Temple*. . . . . 7
2. *Child, Injured—Company not Liable for Damages.* Where a railroad company stops its train not to exceed a minute, as it approaches a railroad crossing within the limits of an incorporated city, and while its cars are standing over a street crossing a child seven years of age, on his way home from school, attempts to take hold of the brake ladder on a freight car in the train, for the purpose of climbing over the car, and the train starts just as he makes the effort to get onto the car, and jerks him off, so that he falls under the wheels and is run over and injured, and the train-men have no knowledge of the attempt upon the part of the boy to board the train, *held*, that the company is not guilty of such negligence toward the boy as to render it liable for damages on account of such injury. *A. T. & S. F. Rld. Co. v. Plaskett*. . . . . 107
3. *Accidental Crossing—Company, not Negligent.* As it approached the crossing of another railroad in a city of 5,000 inhabitants, a freight train stopped not to exceed a minute, so as to block one of the principal streets of the city near a public-school building. A boy seven years old tried to climb over the cars. He was not seen by the train-men. The train started, and he was thrown off and injured. The jury found that the company was negligent, in that the train-men knew that the crossing was frequented by children, and were not on the lookout. *Held*, That there was no evidence of negligence on the part of the company. *Id.*. . . . . 112
4. *Eminent Domain—Instructions.* Upon the trial of an appeal from the award of commissioners appointed to condemn a right-of-way for a railroad company along a highway, it is not error for the trial court to instruct the jury that they are not to take into consideration any benefits which might accrue to the plaintiff, by reason of any change in the location of such public highway. *C. K. & W. Rld. Co. v. Woodward*. . . . . 191

## RAILROADS, AND RAILROAD COMPANIES—CONTINUED:

5. *Damages, not Excessive.* The evidence considered, and found that damages awarded by the jury are not excessive. *Id.*..... 191
6. *Land Grant—Location of Route.* By act of congress of July 26, 1866, the Union Pacific Railway Company, southern branch, afterward the M. K. & T. Railway Company, received a grant of right-of-way for its road 200 feet wide through the reserved and ceded lands of the government. Prior to December 24, 1867, the latter company surveyed its line of road, and filed its map designating its route, with the secretary of the interior. October 9, 1869, one Hodges, one of the grantors of the defendant J. B. Cook, purchased of the government the land in dispute. Afterward, in May and June, 1870, the railway company changed the line of its road and built it across the land in dispute, the original location not having touched the quarter-section to which the land in question belongs. *Held*, That by the survey of its line, and the filing of its map designating the route of its road, the company exercised its right under its grant, and could not reclaim it two years and a half afterward, on changing its line of road, so as to affect the rights of Hodges, or his grantees. *M. K. & T. Rly. Co. v. Cook.*..... 216
7. *Stock Law—Action, Where Brought.* In an action brought under the railroad stock law of 1874, it is essential to allege that the stock was killed or injured in the county in which the action was brought. But where the plaintiff alleges that the defendant company owned and operated the road over and across the plaintiff's premises in Reno county, and that the defendant killed the plaintiff's cow "on the said railway track of said defendant and by the operation of said railway," and no other railroad or railway track is mentioned in the pleadings except the one through the plaintiff's farm, the pleadings sufficiently show that the accident occurred in Reno county, where the action was brought. *W. & C. Rly. Co. v. Gibbs.*..... 274
8. *Cow Killed—Action Maintained.* Where a railroad company owns and operates a railroad, the construction of which is not entirely finished, and while so operating the road permits the contractor who constructed the road to run his construction train over the road so owned and operated by the company, and which at the time is unfenced, and a cow is killed by the construction train in consequence of the omission to enclose the road with a fence where it could have been fenced, an action may be maintained against the railroad company to enforce the statutory liability for the loss of the cow. (*Railroad Co. v. Ewing*, 28 Kas. 273; *Railway Co. v. Wood*, 24 id. 619.) *Id.*.. 274
9. The rejection of testimony which only tended to establish questions not in dispute is not error. *Id.*..... 274
10. *Excessive Verdict.* The verdict in the case found to be excessive, and the judgment is directed to be modified in accordance with the undisputed testimony as to the amount of damages sustained. *Id.*..... 274
11. *Master and Servant—Dangerous Employment—Assumption of Risk.* While it is the duty of an employer, whether a railroad company or other corporation or person, to make the work of his or its employes as safe as is reasonably practicable, yet when the employé, with full knowledge of all the dangers incident to or connected with the employment as it is conducted,

## RAILROADS, AND RAILROAD COMPANIES—CONTINUED:

- accepts the employment, or, having accepted the same, continues in it with such full knowledge, and without any promise on the part of the employer, or any reason to expect on the part of the employé, that the employment will be made less dangerous, the employé assumes all the risks and hazards of the employment. Other matters referred to in the opinion. *A. T. & S. F. Rld. Co. v. Schroeder*..... 315, 316
12. *Companies—Roads through Inclosed Lands—Fences.* Under the provisions of chapter 154 of the Laws of 1885, compelling railroad companies to fence their roads through lands inclosed with a lawful fence, before the owner of the lands can recover the value from a railroad company of a fence built by him in accordance with the provisions of the statute, he must prove that his lands, or a part thereof, which are claimed to be inclosed have a lawful fence—that is, such a fence as is defined by the statute to be a legal or lawful fence. *Mo. Pac. Rly. Co. v. Youngstrom*..... 349
13. *Ejectment, Does not Lie.* Where an owner of land enters into a parol contract with a railroad company authorizing it to take the possession of a portion of his land for a right-of-way and to construct its railroad across the same, for which the railroad company agrees to pay him \$75, and the railroad company, with the knowledge and consent of the owner, takes the possession of the property and constructs its railroad across the same, but does not pay him the \$75 nor any part thereof, the owner cannot then maintain an action in the nature of ejectment to evict the railroad company from the premises and to prevent it from using its railroad, but his remedy is an action for the \$75. *Mo. Pac. Rly. Co. v. Gano*..... 457
14. *Company—Repairs—Recommendation of Railroad Commissioners.* Under the provisions of § 5, chapter 124, Laws of 1883, (§ 1328, Gen. Stat. of 1889,) an order or recommendation of the board of railroad commissioners of the state to a railroad company, requiring repairs to be made upon its road or track, to promote the security, convenience and accommodation of the public, is advisory only. Such an order or recommendation is not final or conclusive upon the railroad company or in the courts. *The State, ex rel., v. K. C. Rld. Co.*..... 497
15. *Company—Negligence—Fire—Findings.* In an action against a railway company to recover damages caused by fire escaping on the right-of-way of such company, the fact that the dry grass of the previous season was suffered to remain on the right-of-way is proper evidence for the jury, and they may find negligence from it. Such negligence is ordinarily a question of fact for the jury; and when the fire was caused by the operation of the railroad, and the jury make special findings, *inter alia*, that the negligence of the defendant consisted in the failure to properly clean its right-of-way, held, that under chapter 155 of the Laws of 1885 the defendant was not entitled to judgment upon such special findings, when the general verdict was for the plaintiff. *St. L. & S. F. Rly. Co. v. Richardson*..... 517
16. *Eminent Domain—Appeal—Evidence.* Upon an appeal from a proceeding to condemn a right-of-way for a railroad, testimony of the amount awarded by the commissioners is not admissible in evidence, and a statement made by the court in its

## RAILROADS, AND RAILROAD COMPANIES—CONTINUED:

- charge to the jury, informing them of the amount so awarded by the commissioners, is unwarranted and erroneous. *C. K. & N. Rly. Co. v. Broquet*. . . . . 571
17. *Measure of Damages*. The measure of damages in such a case is the difference between the market value of the tract from which the right-of-way is taken immediately before and after the time when the land was actually condemned and appropriated. *Id.*. . . . . 571
18. *Statement of Court—Prejudicial Error*. One of the controverted questions on the trial of the appeal was the ownership of the land taken. Before the trial the railway company made a written offer to allow judgment to be taken against it in favor of B. for \$1,000 and costs. The offer was not accepted, and the parties proceeded to trial. After the evidence had been offered and the charge of the court had been given, the court stated in the presence and hearing of the jury that "the Chicago, Kansas & Nebraska Railway Company has filed a paper in this case in which it recognizes Ernest Broquet as defendant or party in interest herein, and in which it made a certain offer to settle with said Broquet for damages to the land in question." *Held*, That, under the issues and circumstances of this case, the making of the statement was prejudicial error. *Id.*. . . . . 571
19. *Company—No Cattle-Guards—Negligence*. The defendant railway company failed and neglected to construct or maintain cattle-guards where its line of railroad entered and left an inclosed pasture. During the time of such neglect, the owner of the pasture attempted to keep his stock from straying by herding the same. One day the herder left the stock to go to dinner. While absent, a cow strayed away, got into a creek, and mired down. *Held*, If the creek was at a great distance from the pasture, or if the miring of the cow was something extraordinary and not to be expected, and it could not be said that the neglect of the railway company was the proximate cause of the loss of the cow, the company would not be liable therefor. *C. K. & N. Rly. Co. v. Holz*. . . . . 627
20. *Fire Set by Locomotive—Pleading and Proof*. In an action against a railway company for damages by fire caused by the operation of such railway, under § 1821 of the General Statutes of 1889, it is only necessary to allege and prove that the fire complained of was caused by the operation of the defendant's railway, to make out a *prima facie* case. Instruction given and refused considered, and found that the trial court committed no error. *Ft. S. W. & W. Rly. Co. v. Tubbs*. . . . . 630
21. *Petition—Findings—Verdict—Case, Distinguished*. Where the plaintiff alleged in his petition that the negligence of the defendant consisted in the omission to keep its roadway clean, and that it negligently allowed dry grass to accumulate and remain on the line of its right-of-way, and the jury returned a special finding that the fire was caused by defective engine, in allowing coals of fire to drop from the fire-box and ignite the dry grass on the right-of way, *held*, that the special finding and general verdict of the jury were in accord with the allegations of the petition, notwithstanding the fact that the petition contained no statement charging that the engine was defective. The case of *St. L. & S. F. Rly. Co. v. Fudge*, 39 Kas. 543, distinguished. *Id.*. . . . . 630

RAILROADS, AND RAILROAD COMPANIES—CONTINUED:

22. *Contributory Negligence.* In an action under ¶ 1321 of the General Statutes, the plaintiff is not chargeable with contributory negligence for a mere failure to take precautions against the negligence of the defendant. *Id.*..... 680
23. *Attorney's Fee—Demand—Jury.* Where the plaintiff desires to recover an attorney's fee, in an action instituted under ¶ 1321 of the General Statutes, he should demand the same in his petition; and when the case is tried by a jury, the question of attorney's fee should be submitted, with the other facts in the case, to the jury. *Id.*..... 680
24. *Fire Caused by Locomotive—Pleading.* In an action against a railroad company for damages caused by fire, where the plaintiff alleges in his pleading facts sufficient, which would, if proved, make out a *prima facie* case against the railroad company under chapter 155 of the Laws of 1885, (Gen. Stat. of 1889, ¶ 1321,) sufficient facts are alleged to constitute a cause of action against the railroad company. *St. L. & S. F. Rly. Co. v. Snavelly*, 687
25. *Condemnation Proceeding—Value of Land Taken—Expert Evidence.* Where farmers or others give their opinions, as experts, as to the market value of land with which they are acquainted, it is not improper, upon cross-examination, for the purpose of testing their knowledge and competency, to inquire of them concerning the sales of adjoining land. *C. K. & N. Rly. Co. v. Stewart*..... 704
26. *Illegal Tax—Involuntary Payment—Recovery.* *K. P. Rly. Co. v. Comm'rs of Wyandotte Co.*, 16 Kas. 587, and *A. T. & S. F. Rld. Co. v. Comm'rs of Atchison Co.*, *infra*, followed, holding that a portion of the illegal tax was paid by plaintiff under such circumstances as to be an involuntary payment, which may be recovered back. *A. T. & S. F. Rld. Co. v. City of Atchison*..... 712
27. *Tax—Involuntary Payment.* The case of *K. P. Rly. Co. v. Comm'rs of Wyandotte Co.*, 16 Kas. 587, followed, holding that the first half of the illegal tax paid by plaintiff on December 17, the treasurer refusing to receive or to receipt for any tax unless the illegal portion was also paid, and where the plaintiff protested against the illegality, and stated that the payment was made solely to avoid the issue of process, and gave notice that an action would be brought to recover that which was illegally exacted, should be considered an involuntary payment. *A. T. & S. F. Rld. Co. v. Comm'rs of Atchison Co.*..... 722
28. *Carriers—Live-Stock Shipments—Connecting Lines.* Where a railroad company contracts to carry stock beyond its own terminus, and there is a stipulation in the contract, which is a condition precedent to a right to recover for loss or injury, that the shipper must give written notice of his claim to an officer of the company, or its nearest station agent, before the stock is removed from the place of destination or delivery or is mingled with other stock, the officers and agents of the connecting company used and adopted by the contracting company should, for the purposes of the contract, be treated as the officers and agents of the latter company, and notice given to the agent of the connecting company at the place of destination will be sufficient. *W. & W. Rly. Co. v. Kook*..... 753



## RAILROADS, AND RAILROAD COMPANIES—CONTINUED:

29. *Notice, not Given as Contract Required.* In the present case notice was not given to the carrier until 12 days after the delivery and removal of the stock; and under the evidence it is held, that notice was not given as the contract required, or within reasonable time. *Id.*..... 758

## RAILROAD COMMISSIONERS—SEE "RAILROADS, AND RAILROAD COMPANIES," 14.

## RATIFICATION—SEE "CONVEYANCE," 2.

## RECEIVER:

1. *Appointment before Action Brought.* Where a receiver is appointed before the intended action is commenced, the appointment is void; but where the intended action is afterward commenced and the defendant afterward makes a voluntary appearance and presents a motion to remove the receiver, and the court or judge overrules the motion, the person originally appointed as receiver will then become such and be such from that time on. *Guy v. Doak.*..... 366
2. *Replevin—Measure of Recovery.* Where an action of replevin is commenced by a person who was appointed receiver, but whose appointment was void, and afterward, as between the parties, he becomes such receiver, and in that manner obtains an interest in the property in controversy, of which property he has the possession, while he must fail in the replevin action for the reason that when he commenced the same he had no right to do so, yet the defendant cannot recover in the action to an extent greater than his own special interest in the property in controversy. *Id.*..... 366

See "PRACTICE, DISTRICT COURT," 3, 4.

## RECORD—SEE "PLEADING AND PRACTICE," 3, 49.

## REGENTS—SEE "STATE NORMAL SCHOOL."

## REGISTRATION—SEE "CITIES," 4.

## REHEARING CASES—SEE

- A. T. & S. F. Rld. Co. v. Plaskett*, p. 112.  
*Guy v. Doak*, p. 366.  
*Hurd v. Simpson*, p. 372.  
*In re Lowe, Appellant*, p. 769.  
*Mastin v. Levagood*, p. 764.  
*Naill v. Insurance Co.*, p. 228.  
*The State v. Bush*, p. 201.

## REMOVAL OF CAUSE—SEE "PLEADING AND PRACTICE," 74.

## REPAIRS—SEE "RAILROADS, AND RAILROAD COMPANIES," 14.

## REPLEVIN:

1. *Vacating Order of Delivery—Review.* An order of the district court vacating an order of delivery issued in an action of replevin is immediately reviewable in the supreme court; the aggrieved party is not required to await the final determination of the cause in the district court. *Carr v. Huffman.*..... 188

REPLEVIN—CONTINUED:

2. *Practice*. An order of delivery cannot be set aside and vacated by the district court after answer for any informality or irregularity in its issue, or because no *præcipe* was filed by the party desiring it. *Id*..... 188
3. *Review—Bailees*. Where, in a suit in replevin, the action is tried upon the theory that the property was in the possession of the defendants, and the trial court so finds, and such finding is unchallenged, this court will not consider the question of the right of the plaintiff to maintain such action because he may have been a bailee of the property in controversy. *Allen v. Gardner* ..... 837
4. *Measure of Recovery*. Where an action of replevin is commenced by a person who was appointed receiver, but whose appointment was void, and afterward, as between the parties, he becomes such receiver, and in that manner obtains an interest in the property in controversy, of which property he has the possession, while he must fail in the replevin action for the reason that when he commenced the same he had no right to do so, yet the defendant cannot recover in the action to an extent greater than his own special interest in the property in controversy. *Guy v. Doak*..... 866
5. *Cattle, not Covered by Mortgage*. And when the mortgagee takes the possession of the mortgaged property for the above reasons, which property consists of 10 head of cattle, and through a mistake takes two head of cattle not covered by the mortgage instead of two of the mortgaged cattle, and the mortgagor replevies the cattle, *held*, that the mortgagor can maintain the action only for the two cattle not covered by the mortgage. *Jones v. Annis*..... 478, 479
6. *Measure of Recovery*. Where the mortgagee while in the possession of the cattle disposes of two head thereof, *held*, that the plaintiff in the replevin action cannot recover a judgment absolutely for the value of these two head of cattle as damages, but he is entitled only to have their price or value deducted from the amount of the mortgage debt still remaining due and unpaid. *Id*..... 479
7. *Pleading—General Denial*. In an action of replevin, any defense to the action may be proved under an answer containing a general denial only; and the plaintiff may, without a reply, rebut any defense proved thereunder. *White v. Gemeny*..... 741
8. *Hotel-Keeper—Omnibus, Exempt*. The 'bus of a hotel-keeper, a resident of Kansas, used in connection with his business in Kansas, and necessary to the successful prosecution of such business, is exempt under subdivision 8 of § 4 of the act relating to exemptions. *Id* ..... 741

REPLY—SEE "REPLEVIN," 7.

RES JUDICATA:

1. *Merger*. An action instituted in another state to have certain conveyances set aside, and subject the property described therein to the payment of the plaintiff's judgment and the claims of all other creditors who might come and set up their demands, is not a bar to an action brought by one of such creditors in this state upon a promissory note owned by

**RES JUDICATA—CONTINUED:**

him, notwithstanding the fact that he appeared in the former action, filed a cross-petition, and obtained a finding from the court of the amount due him upon his note, but did not obtain a personal judgment against the defendant in that action, nor receive anything from the sale of the property affected by such proceeding. To constitute a merger, there must be a valid and subsisting judgment rendered on the cause of action. *Cackley v. Smith*..... 642

2. *Rule.* The rule of *res judicata* applies as well to facts settled and adjudicated as to causes of action. *C. K. & W. Rld. Co. v. Comm'rs of Anderson Co.*..... 766

See "PROBATE COURT."

RESULTING TRUSTS—SEE "TITLE," 7.

REVIEW—SEE "PRACTICE, SUPREME COURT."

REVIVOR OF ACTION—SEE "ACTION," 11.

## S.

SALARY—SEE "PROBATE JUDGE."

SALE—SEE "FRAUD," 8; "GUARDIAN AND WARD."

SALE OF LAND—SEE "CONTRACT," 6; "TITLE," 1, 2, 8.

**SCHOOLS:**

*District—Appointment of Treasurer—Failure to Give Bond.* Where H. is elected as his own successor treasurer of a school district at the annual meeting of said district, and immediately takes the oath of office and continues to perform all the duties of said office for a year without giving a bond, but then gives a bond which is executed according to law, and approved by the director and clerk, and said bond was given as soon as the board fixed the amount of said bond, and afterward, a week or 10 days, the county superintendent appoints H. treasurer for said district, upon the theory that a vacancy exists, because the bond was not given within 20 days after the election of said treasurer, *held*, that no vacancy existed to be filled by appointment of the superintendent, and that the appointment of H. was void. *Horneman v. Harlan*..... 413

SCHOOL DISTRICTS—SEE "SCHOOLS."

SCHOOL-DISTRICT TREASURER—SEE "SCHOOLS."

SECTARIAN COLLEGES—SEE "TAXES, AND TAXATION," 7.

SEPARATE CLASSES—SEE "INSURANCE," 2.

SERVICE BY PUBLICATION—SEE "AFFIDAVIT," 2.

SETTING ASIDE DEFAULT—SEE "PLEADING AND PRACTICE," 16.

**SHERIFF:**

*Conversion—Responsibility.* A sheriff being in the actual possession of a stock of goods by virtue of a levy made in pursuance to three several writs of attachment in his hands, is not responsible to a subsequent chattel mortgagee for conversion, when a receiver duly appointed by the court from which the orders of attachment issued takes exclusive control and possession of the same, and sells and receives the proceeds. *Boot and Shoe Co. v. Ware*..... 488.

**SIGNATURE—SEE “EVIDENCE,” 6.**

**SPECIAL QUESTIONS—SEE “JURY,” 8.**

**STATE AGENT:**

*Compensation—No Appropriation—Mandamus.* In the absence of any specific appropriation by the legislature to pay for the services of a state agent appointed under the provisions of chapter 176, Laws of 1877, (§§ 5982-5985, Gen. Stat. of 1889,) the supreme court will not compel, by *mandamus* or otherwise, the governor, auditor and attorney general to enter into or execute any contract with such agent for his compensation. *The State, ex rel., v. Humphrey*..... 561

**STATE BOARD OF AGRICULTURE—SEE “AGRICULTURE.”**

**STATE NORMAL SCHOOL:**

*Interest, How Drawn from State Treasury.* The statutes of the state require that all moneys derived from the sale of lands of the state normal school, both principal and interest, less the commissions allowed for the sale thereof, shall be paid into the state treasury, where it constitutes the state normal school fund. The interest on this fund is paid to and received by the state treasurer as an officer of the state, and the statute requires him to deposit it in the state treasury. The interest of this fund cannot be drawn from the state treasury by the board of regents of the state normal school, or any officer thereof, except in pursuance of an act of the legislature specifically authorizing the same to be done, passed within two years prior thereto. *The State, ex rel., v. Stover*..... 119

**STATE TREASURY:**

*Normal School Fund—Interest, How Drawn from State Treasury.* The statutes of the state require that all moneys derived from the sale of lands of the state normal school, both principal and interest, less the commissions allowed for the sale thereof, shall be paid into the state treasury, where it constitutes the state normal school fund. The interest on this fund is paid to and received by the state treasurer as an officer of the state, and the statute requires him to deposit it in the state treasury. The interest of this fund cannot be drawn from the state treasury by the board of regents of the state normal school, or any officer thereof, except in pursuance of an act of the legislature specifically authorizing the same to be done, passed within two years prior thereto. *The State, ex rel., v. Stover*..... 119

## STATUTE:

1. *Taking Effect.* Where a statute provides that it shall take effect "from and after its publication," in computing the time when it takes effect, the day of its publication is to be included; but the precise time of its publication, or taking effect, may be shown, where an act is done on the same day of its publication, if the hour of publication affects such act in any way. *Coal Co. v. Barber* ..... 29
  
2. *Appeal, When not Taken.* No appeal or proceeding in error can be had or taken from and after the publication of chapter 245, Laws of 1889, made on the 20th of March, 1889, to the supreme court in any civil action, unless the amount or value in controversy, exclusive of costs, exceeds \$100, except in cases involving the tax or revenue laws, or the title to real estate, or damages for slander, libel, malicious prosecution, or false imprisonment, or the constitution of this state, or the constitution, laws or treaties of the United States, and when in such a case the judge of the district or superior court trying the case involving less than \$100 shall certify to the supreme court that the case is one belonging to the excepted classes. (Civil Code, § 542a, Gen. Stat. of 1889, ¶ 4642.) *Id.* ..... 29
  
3. *Vested Rights—Valid Statute.* A party who has been defeated in a civil action in the district court has no vested right to an appeal or to the prosecution of proceedings in error in the supreme court to review the rulings or judgment of the district court before he has filed his appeal or proceedings in the supreme court; and an act of the legislature taking away the privilege of appeal or the permission to prosecute proceedings in error before the appeal or petition in error is filed, is valid and constitutional. *Id.* ..... 29, 80
  
4. *Anti-Trust Law—Valid Statute.* The provisions of the "anti-trust law," being chapter 257 of the Laws of 1889, so far as they relate to the business of insurance, are covered by the title of the act, and are therefore valid. *In re Pinkney, Petitioner* .... 89
  
5. *Normal School Fund—Interest, How Drawn from State Treasury.* The statutes of the state require that all moneys derived from the sale of lands of the state normal school, both principal and interest, less the commissions allowed for the sale thereof, shall be paid into the state treasury, where it constitutes the state normal school fund. The interest on this fund is paid to and received by the state treasurer as an officer of the state, and the statute requires him to deposit it in the state treasury. The interest of this fund cannot be drawn from the state treasury by the board of regents of the state normal school, or any officer thereof, except in pursuance of an act of the legislature specifically authorizing the same to be done, passed within two years prior thereto. *The State, ex rel., v. Stover* ..... 119
  
6. *Eight-Hour Law—Officers and Employés in Penitentiary.* The officers and employés mentioned in § 20, chapter 152, Laws of 1891, are not embraced in the provisions of chapter 114, Laws of 1891, making it unlawful for laborers, workmen, mechanics, or other persons, employed by the state of Kansas, to work more than eight hours a day. *The State, ex rel., v. Martindale*, 147
  
7. *Laws—Enactment.* All laws shall be enacted by bill. (Const., art. 2, § 20.) *In re Swartz, Petitioner* ..... 157

STATUTE—CONTINUED:

8. *Publication.* Laws of a general nature are not in force until after publication thereof. (Const., art. 2, § 9.) *Id.*..... 157
9. *Invalid Publication.* The publication of an act, omitting the enacting clause, is not a valid publication thereof. *Id.*..... 157
10. *Prosecution, Premature.* Prosecution under an act not yet published is prematurely brought. *Id.*..... 157
11. *Construed.* Section 12, chapter 81, of the act relating to crimes and punishments, (§ 2183, Gen. Stat. of 1889,) is expressly applicable to all crimes or misdemeanors, not amounting to felony, and an assault and battery is within the statute. Intentional violence upon the person killed is not excluded by the statute. *The State v. Spendlove.*..... 160
12. *Insurance Company—Forfeiture of Charter.* The repeal of a statute under which an insurance company is organized, by a subsequent act of the legislature, which declares the charter of such insurance company forfeited unless the company complies with the provisions of the repealing act within a limited time, does not work the cancellation of policies of said company outstanding at the time of the passage of the later act, though the company failed to comply with its provisions and thus forfeited its charter. *Manlove v. Insurance Co.*..... 309

STATUTES CITED AND CONSTRUED:

CIVIL CODE:

10—form of action.....	379
16, subdiv. 2—certain actions to be brought within five years, 60	
16, subdiv. 4—action within 15 years.....	60
17—legal disability to bring action.....	60
18, subdiv. 3—certain actions to be brought within two years, 326	
21—limitation of action—absconding.....	326, 327
35—joinder of plaintiffs.....	374
37—parties plaintiff or defendant.....	374
59—summons—præcipe.....	291
72, 73—notice by publication—affidavit.....	313
74—publication—paper.....	315
83—joinder of actions.....	374, 380
89—demurrer by defendant.....	373, 374
91—waiver by defendant.....	377, 380
92—misjoinder—new petition.....	375, 380
139—amendment at any time.....	611, 750
165—liability of sheriff, how fixed.....	35
167—liability—bail.....	35
176, 177—replevin—delivery.....	189
184, 185—replevin—trial—judgment.....	371
275—trial—order of procedure.....	433
306—new trial—causes.....	315
308—application for new trial—time.....	752
310—petition for new trial.....	314, 315
396—judgment—parties.....	379
523—offer to compromise—costs..	574
528—offer to confess judgment.....	574
534—notice of motion.....	763
542a—jurisdiction of supreme court.....	30, 33
551, 552—stay—judgment—undertaking.....	35
556—limitation—reversing—vacating judgment.....	449

## STATUTES CITED AND CONSTRUED—CONTINUED:

CIVIL CODE—*Continued*:

§ 575—vacating judgment—limitation—time.....	515
§ 601, 602—pay for improvements—tax title.....	70
§ 629—power of court.....	336
§ 724—qualifications of surety.....	616

## CRIMINAL CODE:

§ 69—information, when filed.....	510
§ 72—amendment of information.....	162
§ 236—charge to jury, to be in writing.....	142
§ 326—costs—payment by prosecutor.....	769, 770

## LAWS OF 1871:

Ch. 93, § 17—creation of insurance fund.....	122
--	-----

## LAWS OF 1872:

Ch. 175, § 5—highway, how opened.....	455
Ch. 189, § 4—normal school lands—sale—money paid into state treasury.....	120, 122, 123

## LAWS OF 1874:

Ch. 108, § 12—opening road—notice.....	405
--	-----

## LAWS OF 1875:

Ch. 111—mutual insurance companies.....	224, 225, 226, 229
---	--------------------

## LAWS OF 1877:

Ch. 176, §§ 3, 4—state agent—compensation.....	562
Ch. 179—normal school, Emporia; reorganization.....	124

## LAWS OF 1879:

Ch. 80, § 15—cities; registration of voters, etc.....	203, 205
Ch. 166, § 49—what moneys to be deposited in state treasury...	121
Ch. 166, § 182—payment for work done; appropriation...	563, 564

## LAWS OF 1883:

Ch. 124, § 5—railroad commissioners; duties.....	502, 503, 505
Ch. 143, § 1—permanent school fund; investment.....	121

## LAWS OF 1885:

Ch. 154—railroad companies to fence their roads.....	350
Ch. 155—railroad companies; liability for damages by fire...	520

## LAWS OF 1886:

Ch. 103, § 1—state officers and agents; defining certain crimes, etc.....	564
Ch. 156, § 3—normal school lands; appraisalment.....	121, 122

## LAWS OF 1887:

Ch. 81, § 6—Garfield county; boundaries.....	251
Ch. 165, § 2—intoxicating liquors; sale by druggist.....	417

## LAWS OF 1889:

Ch. 245—supreme court, relating to proceedings in.....	30, 33
Ch. 257, §§ 1, 3—trusts in restraint of trade, unlawful, etc.	90, 91

## LAWS OF 1891:

Ch. 114, §§ 1, 2, 3—eight-hour law.....	147, 148, 149, 150
Ch. 152, §§ 20, 39—salaries of certain state officers, etc.....	149, 150
Ch. 181, § 17—repeal of certain statutes.....	562, 564

STATUTES CITED AND CONSTRUED—CONTINUED:

COMPILED LAWS OF 1862:

Ch. 33, §7—killing without design to effect death.....	164
Ch. 50, §§ 1, 2, 3—act to repeal act incorporating the city of Quindaro.....	696

GENERAL STATUTES OF 1868:

Ch. 6, §1—assignment for benefit of creditors.....	426
Ch. 22—act regulating conveyances.....	177
Ch. 33, §12—descents and distributions—duty of commissioners,	164
Ch. 109, §§ 23, 24—vacating town-sites.....	697

COMPILED LAWS OF 1879:

Ch. 31, §12—manslaughter in the first degree.....	163, 164, 167
Ch. 31, §31—rape.....	155, 167
Ch. 31, §129—forgery in the second degree.....	243
Ch. 31, §133—forgery in the fourth degree.....	243
Ch. 46, §15—guardian to give security.....	64
Ch. 50a—insurance.....	226
Ch. 81, §110—new trial granted, when.....	394

COMPILED LAWS OF 1885:

Ch. 24, §§ 106-118—organization of new counties.....	252
Ch. 25—counties and county officers.....	252
Ch. 26—county seats.....	252

GENERAL STATUTES OF 1889:

§ 342—voluntary assignment, how executed.....	426, 595
§ 502, 507, 513—commissioner to contract for building bridge—how paid for.....	724
§ 711—registration of voters in city—penalty for neglect of duty.....	208, 205
§ 1108-1151—who deemed seized of lands, etc.....	177
§ 1128, 1180—what instruments recorded—when void.....	80
§ 1321—liability of railroads for damages by fire—evidence.....	520
	633, 635, 641
§ 1328—railroad commissioners—powers and duties.....	502, 505
§ 1362, 1363, 1364—railroad crossings—signals—notice.....	113
§ 1491—Garfield county—boundaries.....	251
§ 1577-1593—organization of new counties.....	252
§ 1611-1929—counties and county officers—county-seats.....	252
§ 1655—county expenditures, control of.....	284
§ 1840—county auditor—appointment.....	271, 272, 273
§ 1897—relocation of county-seat.....	284
§ 1930—supreme court—jurisdiction.....	35
§ 2116—probate courts.....	65
§ 2120—process, and service of.....	63
§ 2133—manslaughter in the first degree.....	164
§ 2292—bribing witnesses.....	735
§ 2449—libel—law and fact.....	769
§ 2524—intoxicating liquors, druggists may sell, etc.....	417, 418
§ 2533—intoxicating liquors—public nuisances.....	263
§ 2543—intoxicating liquors—duty of county attorney.....	727, 729
§ 2819—surviving partner—refusal to act.....	303
§ 2820—executor—further bond.....	63
§ 2821, 2822—duties of surviving partner.....	304
§ 2982-2989—executors and administrators—miscellaneous provisions.....	299
§ 2999—exemption—other than head of family.....	743



## STATUTES CITED AND CONSTRUED—CONTINUED:

GENERAL STATUTES OF 1889—*Continued*:

¶ 3165, 3166—leases—debt of another.....	80, 385
¶ 3219, 3228, 3231—guardians and wards—bond—petition for sale or mortgage—security .....	61, 62, 64
¶ 3270, 3272—bastard, death of—death of putative father.....	783
¶ 3868—minority of males—of females.....	60
¶ 3908—chattel mortgage void, unless .....	491
¶ 4641—supreme court—reversing judgments.....	72
¶ 4642—jurisdiction of supreme court.....	30
¶ 4673—modifying judgment—effect on liens.....	24
¶ 4738—mechanics' liens—foreclosure—parties.....	660
¶ 4931—trial before a justice—continuance.....	78
¶ 5355—criminal case—appeal—errors disregarded.....	171
¶ 5476, 5477—highways—notice, record, etc.....	359, 360, 365
¶ 5485—road—notice of opening.....	405
¶ 5594, 5607—school district—officers—forfeiture—treasurer—bond .....	415
¶ 5932-5935—state agent—duties—bond—compensation .....	562, 564
¶ 6249—state board of agriculture .....	183
¶ 6256—county and district agricultural societies .....	187
¶ 6257—premium lists .....	183
¶ 6310, 6312—normal school—location—lands.....	120
¶ 6358-6361—regents of normal school at Emporia, etc.....	124
¶ 6594—state school funds—moneys deposited.....	121
¶ 6654—permanent school fund—investments .....	121
¶ 6675—expenditure of public moneys—contract—restriction, .....	563
¶ 6687—rules for construction of statutes .....	272
¶ 6868—bank stock—taxation .....	746
¶ 6994, 6996—invalid sale of land for taxes.....	70
¶ 7159—trusts concerning lands—in writing.....	80
¶ 7166—trusts and powers—section construed.....	689

STATUTE OF FRAUDS—SEE "FRAUDS," 1, 6.

STOCKHOLDER—SEE "CORPORATIONS."

SUPERSEDEAS BOND—SEE "ACTION," 1; "PRACTION, SUPREME COURT," 4.

SUPPLEMENTAL PETITION—SEE "PLEADING AND PRACTION," 50.

SURETY—SEE "PROMISSORY NOTE," 4.

## T.

TAKING AND CARRYING AWAY—SEE "CRIMINAL LAW," 6.

## TAXES, AND TAXATION:

1. *Ejectment—Rights of Person Holding under Tax Deed.* Where the holder of a tax deed is defeated in an action for the recovery of land sold at the tax sale and described in the tax deed, and the successful claimant is adjudged to pay the holder of the tax deed the taxes, interest, costs, etc., as allowed by law, before he is let into possession, such holder of the tax deed is entitled to retain the possession of the land until the successful claimant pays the taxes, interest, costs, etc., as required of him by the judgment of the court. *Rose v. Newman*..... 18

## TAXES, AND TAXATION—CONTINUED:

2. *Town-Site Certificates—Tax Deeds—Paramount Title.* In an action for the recovery of real estate, where the plaintiff claimed title under a certificate issued by a town-site company, duly assigned, showing that the holder was entitled to a good and sufficient warranty deed, as soon as such company should receive the title to the town-site, and such town-site company obtained the title through the probate judge, but never made a deed to the assignee of such certificate, and the corporation expired by limitation, and the defendant claimed under tax deeds, which were void; and the fact was that he had been in possession of the premises and made lasting and valuable improvements thereon, more than one year before suit was brought: *Held*, That the plaintiff's title was paramount to that of the defendant, and that he was entitled to recover as the equitable owner of such real estate. *Riggs v. Anderson*..... 66
3. *Tenancy in Common—Rights inter se.* Where a husband and wife have an interest in common with other heirs in real estate, and are in the possession and enjoyment of the premises under an agreement to pay the taxes and "keep the place up," and the husband takes an assignment from the county of a tax certificate of sale, this operates as a payment of the delinquent taxes; and an assignee of the tax-sale certificate from the husband takes no greater or higher rights than the husband had, although such assignee furnished the money to the husband with which to purchase said certificate; and in an action for partition between the heirs, where all questions of title are settled in favor of the heirs, the assignee of the tax-sale certificate is not entitled to interest on the amount paid for a tax deed from the date of payment until the day of trial, but is only entitled to interest at the legal rate on the money advanced, subject to a reduction for the annual rental value of that part of the premises of which the assignee was in possession. *Phipps v. Phipps*..... 328
4. *Tax-Sale Certificates—Evidence.* Under the peculiar circumstances of this case, the tax-sale certificate in the hands of the original purchaser, or of his assignee, cannot be used against the heirs for any other purpose than as evidence of the amount of delinquent taxes paid by either of them on the land. *Id.*... 328
5. *Improvements—Value—Recovery.* The assignee of the tax-sale certificate in this case can only recover for the value of such improvements as permanently enhanced the value of the land. *Id.*..... 328
6. *Bank—Transfer to Avoid Taxation—Evidence—Finding.* Whether a resolution of the directors of a national bank made on the 28th day of February, declaring a dividend of \$40,000, payable out of the surplus, to be placed to the credit of stockholders' account, and to remain as a deposit until otherwise ordered, is a mere subterfuge to avoid taxation on the 1st day of March following, or is made in good faith, is a question of fact to be determined by the trial court; and that court having heard the testimony of witnesses and made a finding in favor of the good faith of the transaction, and there being some evidence to support such finding, it will not be disturbed by this court. *Pollard v. National Bank*..... 406
7. *Sectarian Colleges—Void Tax.* There is no power in the officers of a city to subscribe public money in aid of private, sec-

## TAXES, AND TAXATION—CONTINUED:

- tarian colleges, and a tax levied on property within the city for that purpose is void. *A. T. & S. F. Rld. Co. v. City of Atchison*..... 712
8. *Illegal Tax—Involuntary Payment—Recovery.* *K. P. Rly. Co. v. Comm'rs of Wyandotte Co.*, 16 Kas. 587, and *A. T. & S. F. Rld. Co. v. Comm'rs of Atchison Co.*, *infra*, followed, holding that a portion of the illegal tax was paid by plaintiff under such circumstances as to be an involuntary payment, which may be recovered back. *Id.*..... 712
9. *County Bridge—Void Levy.* The levy of a 1-mill tax for building county bridges, the cost of which is payable out of the fund provided for the current expenses of the county, where the levy for county expenses is already up to the limit allowed by statute, is unauthorized and void. *A. T. & S. F. Rld. Co. v. Comm'rs of Atchison Co.*..... 722
10. *Involuntary Payment.* The case of *K. P. Rly. Co. v. Comm'rs of Wyandotte Co.*, 16 Kas. 587, followed, holding that the first half of the illegal tax paid by plaintiff on December 17, the treasurer refusing to receive or to receipt for any tax unless the illegal portion was also paid, and where the plaintiff protested against the illegality, and stated that the payment was made solely to avoid the issue of process, and gave notice that an action would be brought to recover that which was illegally exacted, should be considered an involuntary payment. *Id.*..... 722
11. *Taxation of Banks—Injunction.* Where a bank, organized and existing under the laws of the state, having a capital stock of \$50,000, divided into 500 shares of \$100 each, which are held by various individual stockholders, makes a return to the proper assessor, verified by the oath of its president, showing that the bank is the owner of stock in a company or corporation of the actual value of \$22,000, and thereafter such return is properly filed in the office of the county clerk, and upon such return taxes are assessed and levied against the bank, *held*, that the bank cannot perpetually enjoin the collection of such taxes so levied upon the stock returned by it, upon the ground that the capital stock of the bank is held by individual stockholders. In such a case, no showing for equitable relief on the part of the bank is presented, as the assessment and levy of the taxes complained of were induced solely by the action of the bank. *Winfield Bank v. Nipp*..... 744

TAX DEED—SEE "TAXES, AND TAXATION," 1, 2.

TAX-SALE CERTIFICATES—SEE "TAXES, AND TAXATION," 4.

TECHNICAL ERRORS—SEE "CRIMINAL LAW," 14.

## TENANCY IN COMMON:

*Rights inter se.* Where a husband and wife have an interest in common with other heirs in real estate, and are in the possession and enjoyment of the premises under an agreement to pay the taxes and "keep the place up," and the husband takes an assignment from the county of a tax certificate of sale, this operates as a payment of the delinquent taxes; and an assignee of the tax-sale certificate from the husband takes no greater or higher rights than the husband had, although such assignee

**TENANCY IN COMMON—CONTINUED:**

furnished the money to the husband with which to purchase said certificate; and in an action for partition between the heirs, where all questions of title are settled in favor of the heirs, the assignee of the tax-sale certificate is not entitled to interest on the amount paid for a tax deed from the date of payment until the day of trial, but is only entitled to interest at the legal rate on the money advanced, subject to a reduction for the annual rental value of that part of the premises of which the assignee was in possession. *Phipps v. Phipps*..... 328

“THEREUPON”—SEE “NEW TRIAL,” 6.

**TIME NOT OF ESSENCE OF CONTRACT—SEE “CONTRACT,”**  
26.

**TITLE:**

1. *Contract—Sale of Land—Implied Warranty.* In every contract for the sale of land there is always an implied warranty by the vendor that he has good title, unless such warranty be expressly excluded by the terms of the contract. The implied warranty exists so long as the contract remains executory, i. e., until the deed is given. *Durham v. Hadley*..... 73
2. *Clouded—Purchaser, When not Compelled to Pay.* Where a purchaser enters into a written agreement with the alleged owner of certain land to purchase the same upon installments, and the purchaser afterward discovers that the title is clouded upon the records by an apparent incumbrance in such a manner as to affect the value of the property, and to interfere with the sale of the land to a reasonable purchaser, such a purchaser is not compelled to complete the payments upon his contract and trust to future litigation to clear or quiet the title. *Id.*.. 73, 74
3. *Chattel Mortgage—Lien—Priority.* Where a mortgagee obtains possession of the mortgaged chattels before any lien or other right attaches, his title under the mortgage is good against everybody, if it was previously valid between the original parties to the mortgage. The purchaser of a note secured by a subsequent mortgage upon the same property, taken by the mortgagee with notice of the prior mortgage, is bound to take notice of the possession of the first mortgagee, acquired previous to such purchase. *Gagnon v. Brown*..... 83
4. *Public Land—Assignment of Certificate of Purchase—Not Recorded—When Void.* An assignment of the certificate of purchase of land from the United States may, under the registry laws, be proved or acknowledged and filed for record in the office of the register of deeds; and where it is neither proved nor acknowledged nor so filed for record, it is void under the registry laws of 1859 as to all subsequent purchasers for a valuable consideration without notice, (Act of 1859 relating to Conveyances, § 13,) and void under the registry laws of 1868 as to all persons except such as have actual notice of the assignment. (Act of 1868 relating to Conveyances, §§ 19, 21.) *Shippen v. Kimball*..... 173, 174
5. *Railroad Land Grant—Location of Route.* By act of congress of July 26, 1866, the Union Pacific Railway Company, southern branch, afterward the M. K. & T. Railway Company, received a

## TITLE—CONTINUED:

grant of right of-way for its road 200 feet wide through the reserved and ceded lands of the government. Prior to December 24, 1867, the latter company surveyed its line of road, and filed its map designating its route, with the secretary of the interior. October 9, 1869, one Hodges, one of the grantors of the defendant J. B. Cook, purchased of the government the land in dispute. Afterward, in May and June, 1870, the railway company changed the line of its road and built it across the land in dispute, the original location not having touched the quarter-section to which the land in question belongs. *Held*, That by the survey of its line, and the filing of its map designating the route of its road, the company exercised its right under its grant, and could not reclaim it two years and a half afterward, on changing its line of road, so as to affect the rights of Hodges, or his grantees. *M. K. & T. Rly. Co. v. Cook*. . . . . 216

6. *Homestead—Extent of Right*. Under the homestead exemption laws of this state, the homestead must consist of one body of land. A person residing upon one 40-acre tract of land and owning a second upon which he does not reside, and which only corners with the first, cannot hold the second 40 exempt as a homestead. *Linn Co. Bank v. Hopkins*. . . . . 580

7. *Resulting Trusts—Homestead Purchased with Wife's Funds*. Where a husband and wife reside in another state, and she has a considerable amount of property and he has none, and he is nearly blind, and they agree to come to Kansas and procure land which shall belong to her, and they come and settle upon a quarter-section of government land, intending to procure the title under the United States homestead laws, and the entry thereof is made in his name, but she furnishes all the money to pay the costs and expenses thereof, and to make all the improvements thereon, and valuable improvements are made thereon, and, when final proof is made it is made in his name, but still it is the intention and agreement of the parties that the property shall be hers, and he agrees to convey the title to her as soon as the patent shall be issued, she agreeing to furnish him a home thereon as long as he shall live, and they continue to reside upon the property, and she continues to make improvements thereon, and in a little more than one month after the final proof is made the husband dies intestate, and without executing to his wife any deed for the land, *held*, that under the facts of the case the wife is entitled to the property. *Barlow v. Barlow*. . . . . 676

8. *Sale of Land—Defective Title—Recovery by Vendee of Money Paid*. Where K. sells to B. certain blocks of land, and gives B. a title bond, in which he agrees, upon payment of the purchase-money by B., to execute and deliver to B. a deed conveying an indefeasible estate in fee-simple, B. may refuse to accept a deed for said blocks of land upon the discovery of a cloud on the title in the form of an unsatisfied mortgage of record; and unless K., within a reasonable time after demand, pays such mortgage, or procures a release of the same, B. may bring suit to recover back the money paid on such contract. *Kimball v. Bell*. . . . . 757

See "EJECTMENT," 3; "MORTGAGE," 10.

TITLE, CLOUDED—SEE "TITLE," 2.

- TITLE OF CASE—SEE "PRACTICE, SUPREME COURT," 1.  
 TOWN-SITE CERTIFICATES—SEE "EJECTMENT," 3.  
 TRESPASS—SEE "ACTION," 4; "INJUNCTION," 1.  
 TRIAL ON WRONG THEORY—SEE "PLEADING AND PRACTICE," 72.  
 TROVER AND CONVERSION—SEE "CHATTEL MORTGAGE," 10.

U.

- ULTRA VIRES—SEE "CONTRACT," 21.  
 UNITED STATES CIRCUIT COURT—SEE "PLEADING AND PRACTICE," 74.  
 UNVERIFIED ANSWER—SEE "PLEADING AND PRACTICE," 7.

V.

- VACATION—SEE "JUDGMENT," 1, 12.  
 VALID JUDICIAL SALE—SEE "MORTGAGE," 1.

VENDOR AND VENDEE:

*Fraudulent Sale—Rights of Bona Fide Purchaser.* Where an insolvent merchant sells his stock of merchandise to defraud his creditors, his vendee, without notice of the fraud at the time of the sale, is protected only to the extent of payments made or security or property appropriated in payment thereof before he obtains knowledge of the fraud of his vendor. *Work v. Coverdale*..... 307  
 See "CONTRACT," 22.

VERDICT:

1. *Findings—Harmony.* If the findings of the jury will fairly admit of an interpretation which will make them harmonious with each other and with the general verdict, that interpretation should be given, rather than one which will overturn and destroy the findings and verdict. (Following *Railroad Co. v. Ritz*, 38 Kas. 404.) *Jackson v. Linnington*..... 397
2. *Master and Servant—Death by Wrongful Act—Action by Parents—Excessive Verdict.* In an action brought for the benefit of the parents, as next of kin, to recover for the alleged negligent killing of their son, who was grown up, of full age, and living apart from them, but was unmarried, no proof was offered of the parents' financial condition, or that they had ever received any actual pecuniary benefits from the son during his life-time; nor was there any evidence showing a reasonable probability of pecuniary advantage to them from the continuance of the son's life. *Held*, That a verdict awarding them \$1,500 as damages was excessive, and that under such evidence no more than nominal damages were recoverable. The evidence of negligence produced upon the trial examined, and *held* to be sufficient to warrant the court in submitting the case to the jury. *Coal Co. v. Limb*..... 469

## VERDICT—CONTINUED:

3. *Inconsistent Findings—New Trial.* The record in this case examined, and held, that the special findings of the jury are so inconsistent with each other and with the general verdict, and disclose such a want of intelligence and fairness, that the motion for a new trial should have been sustained by the trial court. *S. K. Rly. Co. v. Gorsuch*..... 588

VERIFICATION—SEE “PLEADING AND PRACTICE,” 7.

VESTED RIGHTS—SEE “STATUTE,” 3.

VOID EXECUTION—SEE “JUSTICES, AND JUSTICES’ COURTS,” 9.

## W.

WAIVER—SEE “ERROR,” 14; “PARTIES.”

WAIVER OF IRREGULARITIES—SEE “ATTACHMENT,” 4.

WARRANTY—SEE “ACTION,” 14; “CONTRACT,” 2; “TITLE,” 1.

## WILL:

*District Courts—Jurisdiction—Claim against Decedent’s Estate.*

The district courts of this state have jurisdiction to entertain and enforce a demand against property of a deceased person who, by will, devoted almost his entire estate to the perpetuation of a banking business in which he had been engaged during his life-time, and whose continuance he committed to executors named in his will; the claim sought to be enforced in the district court having originated in the course of the banking business, some years after the death of the testator, and after all debts of the testator existing at the time of his death had been paid. *In re Hyde, Petitioner*..... 277

## WITNESS:

*Condemnation Proceeding—Value of Land Taken—Expert Evidence.* Where farmers or others give their opinions, as experts, as to the market value of land with which they are acquainted, it is not improper, upon cross-examination, for the purpose of testing their knowledge and competency, to inquire of them concerning the sales of adjoining land. *C. K. & N. Rly. Co. v. Stewart*..... 704

*Ex. S. M.*











